## Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY, Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 and 1263, and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

## No. 73-795

NATIONAL LABOR RELATIONS BOARD,

Petitioner.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134, International Brother-HOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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(The Board's decision and order and the opinion and judgment of the Court of Appeals are not reprinted in this appendix since they are already printed as an appendix to the petition)

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Int'l Brotherhood of Electrical Workers, Locals 641, 622, 759, 820 & 1263

## Case No.:

## 12-CB-1109-2

	12-CB-1109-2
5.25.70	Charge filed in Case No. 12-CB-1109-2
5.25.70	Charge filed in Case No. 12-CB-1116
5.25.70	Charge filed in Case No. 12-CB-1117
5.25.70	Charge filed in Case No. 12-CB-1118
5.25.70	Charge filed in Case No. 12-CB-1119
7.24.70	Order Consolidating Cases, Consolidated Complaint of Hearing, dated
8.13.70	Answer to the Complaint, dated
10.28.70	Amendment to Consolidated Complaint, dated
11.13.70	Parties' Motion to transfer cases to the Board, dated
11.13.70	Parties' Stipulation, dated
12. 3.70	Board's Order granting Motion, approving stipula- tion and transferring proceeding to the Board, dated
9. 2.71	Board's Decision and Order, dated
6.29.73	En Banc Decision of Court of Appeals
1.21.74	Order of Supreme Court granting certiorari

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4. Address (Street, city, State and ZIP cods) System Council U=4	**-	E. M. Brown, F	Tes
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Miami Florida 331	379-2	792 .	/22/70

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(Signature of representative or person mak	ing charge)	(Title or o	lice, if any)	arty
Suite 601, 100 Biscayne				
Miami, Florida 33132	379-	2792	5/22/70	

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VELPULLY PALSE STATEMENTS ON THE CHARGE CAN BE PUNISHED BY FIRE AND IMPRISONMENT (U.S. CODE, TITLE 19, SECTION 1891)

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Local Union No. 1263		E.R. Williams, Pre	Ball
d. Address (Street, city, State and ZIP code) . System Council U=4	Local N		
430 W. 66th St. Hialeah, Fla 3			
e. The above-named organization(a) or its agents has the meaning of section 8 (b), subsection(a)	(B) Subsections)	of the National Labor Rel	ations Act, and
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MASTER EXHIBIT 1820

## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12

[Received, Jul. 27, 1970, Div. of Trial Examiner, NLRB, Wash., D. C.]

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
SYSTEM COUNCIL U-4, and the Following
Affiliates thereof:

Case No. 12-CB-1109-2

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 641

and

Case No. 12-CB-1116

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 622

and

Case No. 12-CB-1117

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 759

and

Case No. 12-CB-1118

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 820

and

Case No. 12-CB-1119

International Brotherhood of Electrical Workers Local Union No. 1263

AND

FLORIDA POWER & LIGHT COMPANY

## ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

It having been charged in Cases Nos. 12-CB-1109-2. 12-CB-1116, 12-CB-1117, 12-CB-1118, and 12-CB-1119, in each case respectively, by Florida Power & Light Company (hereinafter called Florida Power or Employer); that International Brotherhood of Electrical Workers System Council U-4 (hereinafter referred to as System Council U-4), in each case respectively; and in Case No. 12-CB-1109-2, that its affiliated Local Union No. 641 (International Brotherhood of Electrical Workers Local 641, hereafter Local 641); and in Case No. 12-CB-1116 that its affiliated Local Union No. 622 (International Brotherhood of Electrical Workers 622, hereafter Local 622); and in Case No. 12-CB-1118, that its affiliated Local Union No. 820 (International Brotherhood of Electrical Workers Local 820, hereafter Local 820); and in Case No. 12-CB-1119 that its affiliated Local Union No. 1263 (International Brotherhood of Electrical Workers Local 1263, hereafter Local 1263); herein collectively called Respondents, have engaged in and are engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq. herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for Region 12, having duly considered the matter and deeming it necessary to effectuate the purposes of the Act, and to avoid unnecessary costs or delay:

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

(a) The charge in Case No. 12-CB-1109-2 was filed by Florida Power on May 25, 1970, and copies thereof were duly served on Respondents, System Council U-4 and Local 641, respectively, on May 26, 1970.

(b) The charge in Case No. 12-CB-1116 was filed by Florida Power on May 25, 1970, and copies thereof were duly served on Respondents, System Council U-4 on May

26, 1970, and Local 622 on May 27, 1970.

(c) The charge in Case No. 12-CB-1117 was filed by Florida Power on May 25, 1970, and copies thereof were duly served on Respondents, System Council U-4 on May 26, 1970, and Local 759 on May 28, 1970.

(d) The charge in Case No. 12-CB-1118 was filed by Florida Power on May 25, 1970, and copies thereof were duly served on Respondents, System Council U-4 and

Local 820 on May 26, 1970, respectively.

(e) The charge in Case No. 12-CB-1119 was filed by Florida Power on May 25, 1970, and copies thereof were duly served on Respondents, System Council U-4 on May 26, 1970, and Local 1263 on May 28, 1970.

2.

- (a) Florida Power & Light Company (herein called Florida Power) is a Florida corporate utility, with offices and facilities located at various locations within the State of Florida, where it is engaged in the production and sale of electricity. During the past 12 months, Florida Power, in the course and conduct of its operations, received gross revenues in excess of \$500,000, and during the same period it purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida.
- (b) Florida Power is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

3.

System Council U-4, itself, and each of its affiliated Locals named above, to wit, Local 641, 622, 759, 820,

and 1263, are each respectively and have been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

#### 4.

(a) Respondent System Council U-4 is an unincorporated association and is composed of (11) certain Local Unions of the International Brotherhood of Electrical Workers, AFL-CIO, namely Locals 622, 641, 759, 802, and 1263 named individually as Respondents herein and also Locals 359, 627, 1042, 1066, 1191, and 1908. Each of said 11 Local Unions admits to membership employees of Florida Power.

(b) The principal officer and agent of said Local to wit: the President, is a member of the Executive Board

of System Council U-4.

(c) The expressed purpose of System Council U-4 is to further by all lawful and proper means the employment and earning opportunities of the membership of the affiliated Local Unions, and to achieve a greater degree of unity and coordinated action between the several Local Unions in collective bargaining with Florida Power.

(d) System Council U-4 has authority to deal with the authorized representatives of Florida Power and is the authorized agent of all said Locals in all matters pertaining to collective bargaining and is empowered to act as agent to effectuate the objects as stated in 4(c) above.

5.

(a) IBEW System Council U-4 Death Benefit Fund, Inc., is a Florida corporation existing with purpose to protect, provide for, and contribute immediate assistance to the families, widows, children, or beneficiaries of its members upon the death of any member by providing a death benefit fund payable to such beneficiary as the member may designate.

(b) The Board of Directors of IBEW System Council U-4 Death Benefit Fund, Inc., is composed of the duly elected Financial Secretary of each Local Union constituting the System Council U-4, and the duly elected Presi-

dent and Treasurer of System Council U-4.

(c) Inter alia, a condition of eligibility for a member (his wife or widow) in System Council U-4 Death Benefit Fund, Inc., is initial and continued membership in good standing of that member in one of the International Brotherhood of Electrical Workers Local Unions, AFL-CIO, which comprise the Florida Power System Council, that is, System Council U-4's affiliated Local Unions herein.

6.

During times material herein the following persons occupied the position with Respondent Unions set opposite their name and were agents of Respondent Unions within the meaning of the Act:

System Cou	ncil U-4 Business Manager	-	J. H. Niles
Local 641	President	_	J. O. Bottoms
	Recording Secretary	_	B. H. Moore
Local 622	President	_	E. M. Brown
	Recording Secretary	-	G. D. Knight, Sr.
Local 679	President	-	C. A. Holliday
	Recording Secretary	_	R. A. Doak
Local 820	President		R. A. Brennan
. 4	Recording Secretary		W. A. Geschke
Local 1263	President	_	E. R. Williams
	Recording Secretary	_	E. D. Graham

7.

At all material times herein the following named individuals occupied the positions set opposite their name at the respective location of Florida Power as shown:

## (a) Naples

H. E. Weatherly M. R. Weeks	District Supervisor Assistant District Supervisor
Punta Gorda C. E. Baker	Assistant Supervisor
Fort Myers	A-14-4-P1-4-4-
Dan Bigelow	Assistant District Supervisor

#### (b) Brandenton Service Center

R. T. Horne

Temporary Assistant Supervisor

#### Sarasota-Western Division Office

O. M. Brannon

Transmission Line Supervisor

(since early 1970)

Distribution Assistant (during strike)

F. D. Fishel

Distribution Assistant (presently)

Temporary Assistant Supervisor

(during strike)

#### Sarasota Service Center

T. R. Brandewie

Assistant Supervisor (since April 1970)

Temporary Assistant Supervisor

(during strike)

E. W. Jones

Assistant Supervisor

C. A. Norris

Assistant Supervisor

#### Clark Service Center (Sarasota)

C. A. Pearsall

Assistant Supervisor

## Venice Service Center

J. E. Bryan

District Supervisor

H. D. Stephens

Assistant Supervisor

## (c) Lake City

C. J. Rutledge

Assistant Supervisor,

Transmission Distribution Department

## (d) Port Everglades

Richard Ackerman

Results Assistant

Ernest Beasley, Jr.

Assistant Plant Superintendent

Fred Davis

Plant Superintendent

Joseph L. Helmich \* Plant Supervisor

Frank Henderson

Plant Supervisor

R. P. Norman

Assistant Plant Superintendent

S. V. Wanklyn

\* Assistant Plant Engineer

### Pompano Distribution

C. W. Bingham

\* Assistant Supervisor

#### Pompano Service Station

E. F. Borchardt William Cole

\* Assistant Supervisor Distribution Assistant

J. T. Hardy, Jr.

Assistant Supervisor

#### Pompano Beach

C. E. Stout, Jr.

District Supervisor

## Deerfield Service Station

Frank Ludlow

Assistant Supervisor

#### Fort Lauderdale

Underground

P. Den Bleyker Earl Guyaux Assistant Supervisor

\* Assistant Supervisor

#### Plant

T. D. Burkett W. B. Hoffman

L. E. Jones

R. W. LaRoche

\* Assistant Plant Superintendent

Plant Results Technician

\* Distribution Supervisor

Plant Supervisor

## Division Review

L. H. Grubbs

Assistant Supervisor

## Trouble Department

H. E. Hardee

\* Assistant Supervisor

Stanley Hutcheson \* Assistant Supervisor

Charles Pogel A

Assistant Supervisor

#### Substation

T. W. Norton

\* Assistant Supervisor

## Transmission Distribution

Claude Overfelt

Trouble Supervisor

Service Center

R. O. Stamps Assistant Supervisor

Wingate Yard

J. E. McLeod \* Assistant Supervisor
W. H. McNary Assistant Supervisor

H. L. Orton

Assistant Supervisor

Wingate Service Center

Robert Rogers Assistant Supervisor

S. E. Division-Substation Dept.

H. V. Johnson Substation Supervisor
Emil Piazzo Assistant Supervisor
Fred Shaver \* Assistant Supervisor

W. M. Smith \* Assistant Supervisor

Operations Division Office

V. J. Nicholas \* Assistant Supervisor

Hollywood

P. T. McAllister Assistant Supervisor
W. L. Roper Assistant Supervisor

Hollywood Service Center

A. D. Reed \* Assistant Supervisor
Everett Weeks \* Assistant Supervisor

(e) Palatka

William S. Doughty Assistant Supervisor

8.

Each individual named in paragraph 7 possesses the authority on behalf of Florida Power.

(a) To Discipline employees, to grant time off, to schedule and assign work, to exercise independent judgment in the direction of the work force.

- (b) To serve as a representative of Florida Power regarding matters involving collective bargaining interpretation.
  - (c) To adjust grievances.

9.

Each of the individuals named in paragraph 7 is a supervisor within the meaning of the Act.

## 10.

Respondent System Council U-4 and its member Locals, including Respondent Locals 622, 641, 759, 802, and 1263, engaged in an economic strike against Florida Power from on or about October 22, 1969, to on or about December 29, 1969, and in furtherance thereof established picket lines during said period at various locations of Florida Power.

#### 11.

During the period of the strike related in paragraph 9 above and while the picket line was being maintained, each of the individuals named above in paragraph 7 continued working for Florida Power and crossed Respondents' picket lines as required in order to do so.

## 12.

On various dates during the months of January, February, and March 1970 (the exact dates being presently unknown), Respondent Local Unions 622, 641, 759, 820, and 1263, with the knowledge, approval and coordination of System Council U-4, scheduled and held local union trial board hearings on charges brought against each of the individuals named in paragraph 7 because during the strike they had crossed Respondents' picket lines and continued to work for Employer even though each of them at the time of the strike was a member of the International Brotherhood of Electrical Workers or one of its affiliated locals.

As a result of the trial board hearings, Respondent Local Unions, with the knowledge, approval and coordination of Respondent System Council, fined and/or expelled from membership, and caused System Council U-4 Death Benefit Fund, Inc., to cease death benefit coverage as to certain of the individuals named in paragraph 7, and as now known:

(a) Local 641 fined those 4 supervisors named in para-

graph 7(a) above.

(b) Local 820 fined those 9 supervisors named in paragraph 7(b) above, and caused their membership in System Council U-4 Death Benefit Fund, Inc., to be cancelled.

- (c) Local 622 fined C. J. Rutledge and caused his membership in System Council U-4 Death Benefit Fund, Inc., to be cancelled.
- (d) Local 759 fined and expelled those 39 supervisors named in paragraph 7(d) above and thereafter caused at least those certain supervisors in that group whose name bears an asterisk to have their membership in System Council U-4 Death Fund, Inc., cancelled.
- (e) Local 1263 fined William S. Doughty and caused his membership in System Council U-4 Death Fund, Inc., to be cancelled.

## 14.

By the acts described in paragraphs 12 and 13 and by each of said acts, Respondent Unions did individually and collectively restrain and coerce Florida Power in the selection of its representatives for the purposes of collective bargaining or adjustment of grievances and thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b) (1) (B) and Section 2(6) and (7) of the Act.

## 15.

The acts of Respondent System Council U-4 and Respondent Local Unions 622, 641, 759, 820, and 1263 described in paragraphs 12, 13, and 14 above, occurring

in connection with the operations of Florida Power described in paragraph 2 above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 1st day of September 1970, at 9:30 a.m., EDST, in the National Labor Relations Board Hearing Room 717, 51 S. W. First Avenue, Miami, Florida, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to said complaint within ten days from service thereof, and that unless it does so, all the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Respondent shall immediately serve a copy of the answer, as required by the above sections of the Rules, on each of the other parties.

DATED at Tampa, Florida, this 24th day of July 1970.

/s/ Harold A. Boire
HAROLD A. BOIRE,
Regional Director
National Labor Relations Board
Region 12
706 Federal Office Building
500 Zack Street
Tampa, Florida 33602

[SEAL]

Form NLRB-4668 (9-67)

(C CASES)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE CASES AS TAKEN FROM THE BOARD'S PUBLISHED RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in

Washington, D. C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Trial Examiner, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded. but it may well be that the labors of the conference will be evinced in the ultimate record-for example, in the form of statements of position, stipulations, and conces-Except under unusual circumstances, the Trial Examiner conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during and prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Trial Exam-

iner who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D. C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 102.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12

[Received, Nov. 2, 1970, Div. of Trial Examiners, NLRB, Wash., D. C.]

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
SYSTEM COUNCIL U-4, and the Following
Affiliates thereof:

Case No. 12-CB-1109-2

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 641

and

Case No. 12-CB-1116

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL UNION NO. 622

and

Case No. 12-CB-1117

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL UNION NO. 759

and

Case No. 12-CB-1118

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 820

and

Case No. 12-CB-1119

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 1263

AND

FLORIDA POWER & LIGHT COMPANY

## AMENDMENT TO CONSOLIDATED COMPLAINT

The parties to this proceeding presently being in the process of preparing a stipulated record for submission of the issues directly to the Board, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and Section 102.17 of the Board's Rules and Regulations, Series 8, hereby amends the Consolidated Complaint issued in this matter as follows:

(1) Paragraph 11, line 1 of the Consolidated Complaint, strike the numerical designation "9" now appearing and substitute therefor "10";

(2) Paragraph 12, lines 3 and 4 of the Consolidated Complaint, delete the words "approval and coordination";

(3) Paragraph 13, line 2 of the Consolidated Complaint, delete the words "approval and coordination."

DATED AT Tampa, Florida, this 28th day of October 1970.

[SEAL]

/s/ Harold A. Boire
HAROLD A. BOIRE
Regional Director
National Labor Relations Board
Region 12
706 Federal Building
500 Zack Street
Tampa, Florida 33602

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12

[Received, Aug. 19, 1970, Div. of Trial Examiners, NLRB, Wash., D. C.]

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
SYSTEM COUNCIL U-4, and the Following
Affiliates thereof:

Case No. 12-CB-1109-2

International Brotherhood of Electrical Workers Local Union No. 641

and

Case No. 12-CB-1116

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 622

and

Case No. 12-CB-1117

International Brotherhood of Electrical Workers Local Union No. 759

and

Case No. 12-CB-1118

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 820

and

Case No. 12-CB-1119

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 1263

AND

FLORIDA POWER & LIGHT COMPANY

## ANSWER TO THE COMPLAINT

COMES NOW, the Respondents INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYS-TEM COUNCIL U-4 and Its Affiliates LOCAL UNION NO. 641, LOCAL UNION NO. 622, LOCAL UNION NO. 759, LOCAL UNION NO. 820 and LOCAL UNION NO. 1263, by and through its undersigned attorneys and files this, its Answer to the Complaint filed in the above cause, and says:-

1. Respondent admit the allegations contained in paragraphs 1(a), 1(b), 1(c), 1(d), 1(e), 2(a), 2(b), 3,

4(a), 4(b), 4(c), 4(d) and 10.

2. Respondents deny the allegations contained in paragraphs 5(a), 5(b), 5(c), 6, 7(a), 7(b), 7(c), 7(d), 7(e), (8a), 8(b), 8(c), 9, 11, 12, 13(a), 13(b), 13(c), 13(d), 13(e), 14 and 15.

WHEREFORE, Respondents having made a full and complete Answer to the Complaint, Respondents pray that

the same be dismissed.

KASTENBAUM, MAMBER, GOPMAN, EPSTEIN & MILES Attorneys for Respondents Suite 210 One Lincoln Road Building Miami Beach, Florida 33139

By /s/ Seymour A. Gopman SEYMOUR A. GOPMAN, For the Firm

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 13th day of August, 1970, copies of the foregoing Answer to the Complaint were duly served upon the following, by placing same in the United States Mail, postage prepaid and addressed to:

4 copies: National Labor Relations Board Harold A. Boire, Regional Director

Region 12

706 Federal Office Building

500 Zack Street

Tampa, Florida 33602

1 copy: Ray Muller, Esq.

Attorney for Charging Party, Florida Power & Light Company

One Hundred Biscayne Boulevard, North

Miami, Florida 33132

/s/ Seymour A. Gopman SEYMOUR A. GOPMAN

## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
SYSTEM COUNCIL U-4, and the Following
Affiliates thereof:

Case No. 12-CB-1109-2

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 641

and

Case No. 12-CB-1116

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 622

and

Case No. 12-CB-1117

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 759

and

Case No. 12-CB-1118

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 820

and

Case No. 12-CB-1119

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 1263

AND

FLORIDA POWER & LIGHT COMPANY

#### STIPULATION

Each of the above-named parties, and Counsel for the General Counsel, by the signatures affixed below, and in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay involved in a formal hearing herein, stipulate to the following:

I.

A. All matters alleged in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, of the Consolidated

Complaint, as amended, are admitted to be true.

B. Although admitting all of the allegations contained in paragraphs 8 and 9 of the Consolidated Complaint, as amended, the parties agree that the following-named individuals possessed the attributes and characteristics of their employment with the employer as described and stipulated to by the parties in paragraph II, (E) and (F) below:

R. T. Horne

T. R. Brandewie

C. T. Rutledge

W. S. Doughty

R. Ackerman

W. B. Hoffman

L. H. Grubbs

C. Respondents deny the allegations of paragraphs number 14 and 15 of the Complaint as amended, and all parties agree that the issue to be decided is whether Respondents by the actions set forth in paragraphs number "12" and "13" of the Consolidated Complaint, as amended, violated Section 8(b) (1) (B) and Section 2(6) and (7) of the Act.

## II.

A. Respondent System Council U-4, an unincorporated association, as set out hereafter, is a labor organization within the meaning of Section 2(5) of the Act. It is,

and at all times material hereto was engaged in representing certain employees of Florida Power & Light Company (hereinafter called FP & L), throughout FP & L's operation in the State of Florida, and is, and at all times material hereto was an agent of Respondent Local Unions. System Council U-4 is, and at all times material hereto, was composed of certain local unions of the International Brotherhood of Electrical Workers, AFL-CIO, to wit: Locals, 359, 622, 627, 641, 759, 820, 1042, 1066, 1191, 1263 and 1908, all labor organizations within the meaning of Section 2(5) of the Act. The said locals are engaged exclusively in representing certain employees of FP & L. The principal officer and agent of each Respondent Local Union, to wit: its President, is a member of the Executive Board of Respondent System Council U-4. Respondent System Council U-4 maintains an office and principal place of business at 430 West 66th Street. Arcade 12, Hialeah, Florida, from which office and principal place of business Respondent System Council U-4 conducts business throughout the State of Florida and more particularly in the identical counties in which FP & L conducts business.

B. On October 22, 1969, Respondent labor organizations commenced an economic strike against FP & L. Said strike continued to December 29, 1969. Throughout the strike, Respondent Local Unions maintained picket lines at all, or substantially all, FP & L operational locations. Picket signs carried by pickets stated: "IBEW Local ——— On Strike Against FP & L." The numerical designation of the Local on the picket sign varied depending upon which Local represented the employees in the particular locality.

C. Following notification of charges filed, and notification of a Trial Board hearing, the individuals named in paragraph 7 of the Complaint were advised of the Local Union's decision with reference to the findings of violations, as set forth hereafter. The references below to violations of specific numbered Sections are to Sections of the International Constitution (Ex. 5) as adopted by the System Council By-Laws (Ex. 3):

		Q		
Name	Sections Violated	Findings & Discipline	Present Status	
H. E. Weatherly	Article XXVII Section 1, (3), (10) and (21)	Guilty Fined \$6,000	Appeal taken & fine set aside completely.	
M. R. Weeks	Article XXVII Section 1, (3), (10) and (21)	Guilty, Fined \$6,000	Weeks did not appeal.	
C. E. Baker	Article XXVII Section 1, (3), (10) and (21)	Guilty, Fined \$6,000	Baker did not appeal.	30
Dan Bigelow	Article XXVII Section 1, (3), (10) and 21)	Guilty, Fined \$6,000	Bigelow did not appeal.	
R. T. Horne	Article XXVII Section 1, (3), (10) and (21)	Guilty, Fined \$6,000 Reduced \$500 Remaining fine \$5500	No appeal.	
O. M. Brannon	Article XXVII Section 1, (3), (10) and (21)	Guilty, Fined \$500 Reduced \$400 Remaining fine \$100	No appeal.	
		_		

No appeal.	No appeal.	No appeal.	No appeal.	No appeal.	Appealed, Appeal denied.	Appealed, Appeal denied.
Guilty, Fined \$6,000 Reduced \$5500 Remaining fine \$500	Guilty, Fined \$6,000 No Reduction	Guilty, Fined \$500 Reduced \$400 Remaining fine \$100				
Article XXVII Section 1, (3), (10) and (21)	Article XXVII Section 1, (3), (10) and (21)	Article XXVII Section 1, (3), (10) and (21)	Article XXVII Section 1, (3), (10) and (21)	Article XXVII Section 1, (3), (10) and (21)	Article XXVII Section 1, (3), (10) and (21)	Article XXVII Section 1, (3), (10) and (21)
F. D. Fishel	T. R. Brandewie	E. W. Jones	C. A. Norris	C. A. Pearsall	J. E. Bryan	H. D. Stephens

Name	Sections Violated	Findings & Discipline	Present Status	
C. J. Rutledge	Article XXVII Section 1, and (21)	Guilty, Fined \$1500 Suspended from union for 3 years	Appealed, Appeal denied; Judgment modified on appeal to reduce fine from \$1500 to \$100, and suspension set aside.	
Richard Ackerman	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
Ernest Beasley, Jr.	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
Fred Davis	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000	No appeal.	
Joseph L. Helmich	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	

Frank Henderson	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
R. P. Norman	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
S. V. Wanklyn	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
C. W. Bingham	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
E. F. Borchardt	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
William Cole	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	

Name	Sections Violated	Findings & Discipline	Present Status	,
J. T. Hardy, Jr.	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
C. E. Stout, Jr.	Article XXVII Section 1, (3), (9), (10) and (12)	Guilty, Fined \$1,000 Expelled	No appeal.	
Frank Ludlow	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
P. Den Bleyker	Article XXVII Section 1, (3), (9)(, (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
Earl Guyaux	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	

No appeal.	Appealed; Appeal denied.	No appeal.	Appealed; Appeal denied.	No appeal.	No appeal.
Guilty,	Guilty,	Guilty,	Guilty,	Guilty,	Guilty,
Fined \$1,000	Fined \$1,000	Fined \$1,000	Fined \$1,000	Fined \$1,000	Fined \$1,000
Expelled	Expelled	Expelled	Expelled	Expelled	Expelled
Article XXVII	Article XXVII	Article XXVII	Article XXVII	Article XXVII	Article XXVII
Section 1,	Section 1,	Section 1,	Section 1,	Section 1,	Section 1,
(3), (9), (10)	(3), (9), (10)	(3), (9), (10)	(3), (9), (10)	(3), (9), (10)	(3), (9), (10)
and (21)	and (21)	and (21)	and (21)	and (21)	and (21)
D. Burkett	. B. Hoffman	E. Jones	W. LaRoche	H. Grubbs	E. Hardee

Name	Sections Violated	Findings & Discipline	Present Status	
Stanley Hutcheson	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
Charles Pogel	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
T. W. Norton	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	36
Claude Overfeit	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
R. O. Stamps	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Expelled	No appeal.	
Everett Weeks	Article XXVII Section 1, (3), (9), (10) and (21)	Guilty, Fined \$1,000 Guilty,	No appeal.	

Article XXVII Section 1, (3) and (21)

Expelled from the Union

No appeal.

D. All individuals listed in paragraph number 7(d) of the Complaint were charged in accordance with the IBEW Constitution and tried by Respondent Local 759 with, inter alia, performing bargaining unit work for FP & L during the strike described in paragraph number 10 of the Complaint. They were found guilty of such charges. Additionally, C. J. Rutledge, who is named in paragraph 7(c) of the Complaint, was charged in accordance with the IBEW Constitution and tried by Respondent Local 622 with, inter alia, performing bargaining unit work for FP &L during the strike described in paragraph number 10 of the Complaint. He was found guilty Further, J. E. Bryan and H. D. of such charges. Stephens, who are named in paragraph 7(b) of the Complaint, were charged in accordance with the IBEW Constitution and tried by Respondent Local 820 with, inter alia, performing bargaining unit work for FP & L during the strike described in paragraph number 10 of the Complaint. They were likewise found guilty of such charges.

E. The following individuals occupied bargaining unit positions until the date set forth below opposite the respective name, after which they became "Temporary Assistant Supervisor," an established non-bargaining unit supervisory position within the meaning of Section 2(11) of the Act. As "Temporary Assistant Supervisor" they

supervised bargaining unit personnel:

R. T. Horne —Complaint Paragraph 7(b)—6/7/69

T. R. Brandewie —Complaint Paragraph 7(b)—10/18/69

C. J. Rutledge —Complaint Paragraph 7(c)— 9/13/69

W. S. Doughty —Complaint Paragraph 7(e)—10/18/69

William Doughty announced his promotion to the position of supervisor on October 16, 1969, six days before the strike, by indicated letter dated January 18, 1970, addressed to Executive Board Local #1263, Palatka, Florida, 32077 (Ex. 6).

While the company records show that C. J. Rutledge was appointed to the position of Temporary Assistant Supervisor on 9/13/69, he worked prior to the strike in that capacity only as a relief Temporary Assistant Super-

visor. Rutledge was on vacation prior to the strike and returned to work on Monday, October 20, 1969, and only assumed full-time duties of a Temporary Assistant Supervisor beginning on October 20, 1970.

The term "Temporary" in Temporary Assistant Supervisor indicates a probationary position, not permanent, because these employees were on probation in that capacity, with no guarantee that they would keep such position, and many times in the past were returned to bargaining unit positions.

F. The below-named individuals (all of whose names appear in paragraph 7(d) of the Complaint) at all times material hereto were supervisors within the meaning of Section 2(5) of the Act. In such supervisory capacity however, they did not adjust grievances of, or supervise bargaining unit personnel, but adjusted grievances of, and supervised non-bargaining unit personnel only:

R. Ackerman

W. B. Hoffman

L. H. Grubbs

- G. Certain of the individuals named in paragraph number 7(d) of the Complaint were not active members of any Local Union at variously, the time of the strike or during the strike or at the time of discipline. The union membership status of those individuals is as follows:
- 1. P. D. Bleykar; honorary withdrawal from Local Union 759 in March 1969 and dropped from Local Union rolls August 1969. Was not a member of the Local or International Union, but did have the right, because of honorary withdrawal, of re-joining Local Union at any time he was in good standing. Under the practice that existed, he continued to pay fees to the System Council U-4 Death Benefit Fund.
- 2. E. Guyaux; honorary withdrawal from Local Union 759 in December 1967 and dropped from Local Union rolls June 1968. Was not a member of the Local or International Union, but did have the right, because of honorary withdrawal, of re-joining Local Union at any time he was in good standing. Under the practice that

existed, he continued to pay fees to the System Council U-4 Death Benefit Fund.

- 3. L. H. Grubbs; honorary withdrawal from Local Union 759 in August, 1958, and dropped from Local Union 759's rolls about that time. Was not a member of the Local or International Union, but did have the right, because of honorary withdrawal, of re-joining Local Union at any time he was in good standing.
- 4. J. E. McLeod; honorary withdrawal from Local Union 759 in June 1969 and dropped from Local Union rolls December 1969. Was not a member of the Local or International Union, but did have the right, because of honorary withdrawal, of re-joining Local Union at any time he was in good standing. Under the practice that existed, he continued to pay fees to the System Council U-4 Death Benefit Fund.
- 5. Robert Rogers; honorary withdrawal from Local Union 759 in February 1969 and dropped from Local Union rolls August 1969. Was not a member of the Local or International Union, but did have the right, because of honorary withdrawal, of re-joining Local Union at any time he was in good standing. Under the practice that existed, he continued to pay fees to the System Council U-4 Death Benefit Fund.
- 6. H. V. Johnson; honorary withdrawal from Local Union 759 in 1968 and dropped from Local Union rolls at that time. Was not a member of the Local or International Union, but did have the right, because of honorary withdrawal, of re-joining Local Union at any time he was in good standing. Under the practice that existed, he continued to pay fees to the System Council U-4 Death Benefit Fund.
- 7. W. M. Smith; honorary withdrawal from Local Union 759 in 1969 and dropped from Local Union rolls April 1970. Was not a member of the Local or International Union, but did have the right, because of honorary withdrawal, of re-joining Local Union at any time he was in good standing. Under the practice that existed, he continued to pay fees to the System Council U-4 Death Benefit Fund.

H. A provision of the International Constitution, to wit: Article XII, pp. 30 et seq., requires that an applicant for union pension benefits must have been in continuous good standing for specified periods of time, otherwise eligibility for pension benefits ceases. All individuals named in paragraph 7 of the Complaint are not in good standing and cannot re-apply to the Local or International Union for admission or an arrangement whereby they would be entitled to International pension benefits solely because of the herein complained of discipline imposed by Respondents.

I. A provision of the System Council U-4 Death Benefit Fund Articles of Incorporation and By-Laws, to wit: Article III, pp. 8 et seq., states that benefits are available only to members in good standing of one of the Local Unions comprising System Council U-4. This has been applied and interpreted to include those who were once members in good standing of the Local Unions in the System Council, but who left on an honorary basis. Those individuals named in paragraph 7 of the Complaint and referred to in paragraphs numbered 13(b), 13(c), 13(d) and 13(e) of the Complaint lost their good standing in their particular Respondent Local Union solely because of the herein complained of discipline imposed by the Respondents, and therefore are not deemed eligible for participation in the System Council U-4 Death Benefit Fund

### III.

A. Included in the bargaining unit are the individuals filing the following work classifications:

Division Load Dispatcher Watch Engineer Maintenance Foreman Chief Electrician Mobil Unit Foreman Line Foreman Construction Foreman
Meter Foreman
Substation Maintenance Foreman
Distribution Dispatcher
Itinerant Line Foreman
Itinerant Construction Foreman
Itinerant Substation Maintenance Foreman
Equipment Repair Foreman
Communications and Battery Man

The parties stipulate that the aforeclassified individuals are supervisors within the meaning of Section 2(11) of the Act, to wit: that they have the authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, and the exercise of such authority is not of a merely routine or clerical nature. In such capacity, they have authority to, and do, adjust grievances of bargaining unit personnel.

B. During the strike, employees within the aforementioned work classifications (III A, above), crossed picket lines established by the Respondents and other Unions affiliated in the System Council. These supervisory employees performed some bargaining unit work for the Charging Party. Respondents and the other Unions affiliated in the System Council brought charges against supervisors in these classifications for crossing the picket line and for performing some bargaining unit work for the Employer. In the proceedings stemming of these Union charges, some of these employees were found guilty and disciplined by Respondents and the affiliated Unions in the System Council. The Charging Party did not file charges with the Board charging the Act was violated because of the Union discipline meted out to the supervisors in the work classifications described in III A. above.

### IV.

At all times that the parties have had a collective-bargaining relationship, including the times material herein, neither FP & L nor Respondents required supervisors to become union members or withdraw from the Union. The retention of membership in the Union by supervisors was voluntary, and neither FP & L nor Respondents influenced them in this retention.

### V.

The parties stipulate that the following documents shall be admitted in evidence without limitation and for all purposes:

Exhibit 1: Collective bargaining agreement for period 2/17/67—9/3/69.

Exhibit 2: Collective bargaining agreement for period 1/14/70—10/31/71.

Exhibit 3: System Council U-4 By-Laws.

Exhibit 4: System Council U-4 Death Benefit Plan.

Exhibit 5: IBEW International Constitution.

Exhibit 6: January 18, 1970 letter from W. S. Doughty to Executive Board, Local Union #1263.

### VI.

The parties agree that the charges, Consolidated Complaint, Amendment to Consolidated Complaint, and the "Stipulation," constitutes the entire record in the cases and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision; and desire to submit these cases for findings of facts, conclusions of law, and order directly by the Board.

In the event the Board receives this Stipulation, the parties request that the Board set a time for the filing of briefs.

### VII.

This Stipulation is made without prejudice to any objection that any party may have as to the materiality, relevancy, or competancy of any facts stated herein.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYSTEM COUNCIL U-4, and the Following Affiliates thereof:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 641

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 622

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 759

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 820

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 1263

Dated: — By:

(Seymour A. Gopman, Attorney for above-named Respondents) FLORIDA POWER & LIGHT COMPANY

Dated: 11/12/70 By: Ray C. Muller

(RAY C. MULLER, Attorney for

Charging Party)

COUNSEL FOR THE GENERAL

COUNSEL

Dated: \_\_\_\_\_ By

(Robert L. Westheimer, Attorney)

### MEMORANDUM OF AGREEMENT

AGREEMENT, made and entered into this 28 day of August, 1953, as amended and changed May 20, 1954, as amended and changed September 28, 1955, as amended and changed November 2, 1956, as amended and changed December 30, 1957, as amended and changed February 11, 1959, as amended and changed December 21, 1960, as amended and changed April 10, 1963, as amended and changed March 16, 1965, and as amended and changed February 17, 1967, by and between the FLORIDA POWER & LIGHT COMPANY, its successors or assigns, (hereinafter called the "Company") and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO through its System Council U-4 comprising

### LOCAL UNIONS

No. 359-Miami

No. 622-Lake City

No. 627-Fort Pierce

No. 641-Punta Gorda

No. 759-Fort Lauderdale

No. 820-Sarasota and Bradenton

No. 1042-Sanford

No. 1066-Daytona Beach

No. 1191-West Palm Beach

No. 1263-Palatka and St. Augustine

No. 1908-Cocoa

(hereinafter called the "Union"), as the exclusive bargaining representative for employees of the Company in the payroll classifications listed in Exhibit 'A' attached hereto, now or hereinafter employed by the Company during the term of this Agreement.

### ARTICLE I

### GENERAL CONDITIONS

### 1. RECOGNITION AND REPRESENTATION

The Company recognizes the right of its employees to organize and to bargain collectively through representatives of their own choosing. The Union is hereby recognized as the exclusive collective bargaining representative with respect to rates of pay, hours of work, and other conditions of employment for all employees of the Company working in the classifications listed in Exhibit 'A' attached hereto, except as otherwise provided in Paragraph 3 hereinafter. The Company agrees to meet and deal with the duly accredited officers, committee or representatives of the Union on all matters covered by the terms of this Agreement.

### 3. STUDENT ENGINEERS — EMPLOYEES WITH SPECIAL EXPERIENCE

A reasonable number of Co-op Students, and a number of Student Engineers not in excess of 1% of the bargaining unit at any one time, may be assigned to work with a bargaining unit employee at different occupations within the bargaining unit as part of a training period. While so employed, such employees shall neither be affected by the terms of this Agreement nor shall their employment affect the status of other employees covered by this Agreement. Any individual Co-op student will not be assigned to any job or classification covered by this Agreement for a period in excess of six months at a time. A Student Engineer will not be assigned to any job or classification covered by this Agreement for a period in excess of three months.

A Co-op student is an employee who spends part of the year attending a college or university and the remainder of the year working for the Company under the provisions of a Co-op Training Program. A Student Engineer is a college graduate or other specially trained full-time

employee who is assigned to various duties as outlined above in the course of an orientation-training program.

### 4.1 COMPANY-FOREMAN RELATIONSHIP

It is agreed that all promotions to and demotions from classifications in the wage bracket of Distribution Dispatcher (FL-WB) and above, as shown in Exhibit 'A', will not be subject to the arbitration step provided in the Agreement. It is further agreed that employees in such classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification. It is further agreed that the inclusion in the bargaining unit of the employees in the wage bracket of Distribution Dispatcher (FL-WB) and above, and any others who may be in a bona fide supervisory capacity, shall not preclude the Company from having direct communication with such supervisory personnel to the same extent as if they were not included in the bargaining unit.

### 6. EMPLOYEES ILLNESS—DEATH IN FAMILY

- (a) An employee who is absent due to bona fide illness will be paid in any given year, dating from anniversary date of employment, to the extent required by his illness, except illness due to employee's use of alcohol, as follows:
- (1) One (1) week after six months' continuous service;
- (2) Two (2) weeks after one years' continuous service;

- (3) Three (3) weeks after three years' continuous service;
- (4) Four (4) weeks after four years' continuous service;
- (6) Six (6) weeks after five years' continuous service;
- (6) Eight (8) weeks after ten years' continuous service.

Full or partial payment of wages covering absences outside the above limits may be granted in deserving cases upon the recommendation of the Department Head and the approval of a Vice President of the Company.

(b) To such extent the employee shall be paid his salary for each regular scheduled work day lost up to eight (8) hours because of such bona fide illness. Pay for bona fide illness shall not be cumulative and no employee shall receive sick leave pay for more than forty (40) hours in any one week.

(c) Upon specific abuse the Company may require the employee to furnish to the Company a certificate from a competent physician before payment will be made for such illness. If the employee claims pay for illness without just cause, or accepts employment elsewhere during such illness, he shall be subject to disciplinary action.

(d) In case of death of an employee's Mother, Father, Foster Parents, Brother, Sister, Wife, Husband, Son, Daughter, Mother-in-law, or Father-in-law, he shall be allowed reasonable and necessary time to attend the funeral up to three (3) days' leave without loss in his regular pay.

(e) In case of serious illness of an employee's Mother, Father, Foster Parents, Brother, Sister, Wife, Husband,

Son or Daughter, he shall be allowed reasonable

### 16. BREAK IN SENIORITY—CONTINUOUS SERVICE

The seniority of any employee shall terminate under any of the following conditions:

- (a) When laid off for a period of more than twelve (12) months.
- (b) When an employee temporarily laid off fails to return to work within fifteen (15) calendar days after written notice by registered mail to his last known address, requesting such return, or if such employee fails to notify the Company within fortyeight (48) hours after written notice has been delivered to him of his intention to return to work within fifteen (15) calendar days.
- (c)) When an employee resigns his employment with the Company (except as provided in Paragraph 51).
- (d)) When an employee is discharged for just cause.
- (e) Continuous service as used for determining vacations, employee illness, and employee injury allowances, shall not be affected by lay-offs of less than twelve (12) months' duration.

### 17. QUALIFICATIONS FOR FILLING VACANCIES

In the filling of any jobs, vacancies, and making promotions (the word "promotion" shall mean advancement to a higher job classification), seniority as defined in Paragraph 15 shall be given full consideration and where ability, skill and qualifications are reasonably equal, seniority, as defined in Paragraph 15, shall control. Final determination of such qualifications shall be made by the Company except that any dispute which may arise in connection with any such matter shall be handled in accordance with the provisions of Article IV of this Agreement. Any employee who is promoted or transferred shall be given a reasonable time to acquaint himself with the job

### 22 DISCHARGE FOR CAUSE

If the Union believes any discharge of an employee for cause to be in violation of the terms of this Agreement, the matter shall be considered a grievance and shall be handled as provided in Article IV of this Agreement; and the Board of Arbitration, in cases where it determines that an employee has been discharged in violation of the terms of this Agreement, may make an award to such an employee for all time lost and the employee shall be reinstated to his former position without any loss of seniority.

### ARTICLE III

### MAINTENANCE OF MEMBERSHIP

### 23. MAINTENANCE OF MEMBERSHIP

All employees covered by this Agreement who, on August 28th, 1953, are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and all employees covered by this Agreement who thereafter become members shall as a condition of employment keep their monthly dues and regular assessments paid up in the Union for the duration of this Agreement.

### 24. EXPLANATORY NOTICE

Immediately after the execution of this Agreement the Company and the Union shall post and continue to keep posted on the Company's various bulletin boards for the duration of this Agreement, explanation of the above Maintenance of Membership provision in the form attached to this Agreement and marked Exhibit 'B'.

### 25. GRIEVANCE AS TO APPLICATION

If any dispute of any nature arises as to the application of any provision of this Article to any employee, the matter shall be regarded as a grievance and submitted to the grievance procedure as provided in Article IV of this Agreement.

### ARTICLE IV

### GRIEVANCES—CONFERENCES—ARBITRATION

### 26. GRIEVANCES DEFINED

A grievance is hereby defined as a violation of the terms of this Agreement or any type of supervisory conduct which unjustly denies to any employee his job or any benefit arising out of his job and notice of which has been given in writing within six (6) calendar weeks after its occurrence.

### 27. GRIEVANCE HANDLING PROCEDURE

(a) Should any difference arise between an employee covered by this Agreement and a representative of the Company, the employee and/or the Job Steward shall discuss such difference informally with the immediate supervisor for the purpose of settling differences in the simplest and most direct manner in order to avoid grievances. If, after these discussions, a difference still exists involving a matter referred to in Paragraph 26, unless by mutual agreement in writing signed by both parties another procedure is adopted, such matter shall be taken up in the following manner:

First: The matter may become a formal grievance if reduced to writing, signed by the party making the grievance and taken up with the immediate supervisor within

six (6) calendar weeks after its occurrence.

Second: If any matter is not settled in the first step within ten (10) days, the Business Manager of the Union and the Vice President in charge of Operations or such representative as either may designate, shall discuss the matter further. The Supervisor and the Local Union Representative may be included in these discussions.

Third: Any matter not settled as provided in the second step above shall within thirty (30) days after disposal in the first step above be referred to the President of the Company, or his personal representative, and the Business Manager of the Union and the System Commit-

tee (which the Union agrees shall consist of not more than four (4) members). A representative of the International President may also be included in this step.

Fourth: Should any matter that has been referred to representatives of the parties, as provided in the third step above, not be satisfactorily adjusted within thirty (30) days from the date of such referral, either party may within sixty (60) days from date of such referral demand arbitration of the matter by giving written notice to the other. Upon the Union requesting arbitration, all such grievances which are not settled within sixty (60) days from the date that No Agreement is reached in the Second Step on the first such grievance not settled within that period may be grouped for submission to a single Arbitration Board regardless of the issues involved. In cases where the time limit is extended for handling in the Third Step, such time limit extensions will be added to the 60 day period.

(b) A grievance of a general nature or a grievance on the interpretation of the Agreement which is brought by someone other than an aggrieved employee and is not confined to an individual employee or group of employees in a particular location shall be brought as a grievance of the Union. The Business Manager, or his representative, shall present such grievance in writing to the Vice President in charge of Operations or such representative as he may designate. In the event such grievance is not disposed of within thirty (30) days after presentation, it may be referred to the parties as provided in the third

step of the grievance handling procedure.

(c) When any favorable or unfavorable incident occurs to an employee, a record of which is made by the Company, he will be furnished a copy of same, within four (4) weeks of its occurrence, in order that he may have an opportunity to correct the record. If this provision is not complied with, no such incident will be considered in applying disciplinary action nor will it be used against an employee in grievance or arbitration procedure.

### 28. ARBITRATION BOARD—POWERS

(a) Within ten (10) days after written notice is given by either party requesting arbitration as provided in Paragraph 27, the matter shall be referred to a temporary Board of Arbitration consisting of one member designated by the Company, one member designated by the Union and a third member to be selected by these two members. In the event one of the parties refuses or fails to so designate its representatives, then the party in default shall forfeit its case. In the event the members of the Board of Arbitration fail to select a third member within three (3) days, the parties shall jointly request the American Arbitration Association to appoint the third member, both parties to be bound by such appointment. In the event one of the parties refuses or fails to join in such request, then the party in default shall forfeit its case. The majority decision of the Board of Arbitration shall be final and binding on both parties hereto.

(b) The Board of Arbitration shall be governed wholly by the terms of this Agreement and shall have no power to add to or change its terms, nor shall the Board of Arbitration be authorized to pass on matters which are

not properly grievances as defined herein.

### 29. ARBITRATION BOARD—INTERPRETATION OF WAGE SCHEDULES

When the dispute involves interpretation of wage schedules or promotions, any decision of the Arbitration Board shall not, in any case, be retroactive prior to the date on which the dispute originated.

### 30. ARBITRATION BOARD—EXPENSES

Each party shall defray the expenses of its own member of the Board of Arbitration, together with any expense in presenting its own case. The fee and expenses of the third member of the Board, if any, shall be borne equally by the parties, together with any incidental or general expenses in connection with the arbitration, mutually agreed upon in advance. If the member of the Board designated by the Union is an employee of the Company, necessary time off required to attend such arbitration proceedings shall be allowed without pay.

### 31. CESSATION OF WORK—DISCHARGE IF GRIEV-ANCE PROCEDURE NOT FOLLOWED

Cessation of work or refusal to work by any employee on account of any grievance or alleged grievance of any employee if the grievance procedure above set forth has not been fully complied with by the employee or employees or their representatives, shall constitute grounds for discharge or suspension of such employee. Nothing in this paragraph shall abridge the rights of any employee as set forth in Paragraph 45 relating to Saftey.

### 32. EMPLOYEES—TIME OFF FOR MEETING—PAY

(a) Employees of the Company, members of the Union's Committee representing any of the Local Unions above mentioned, will be allowed time off without loss of pay from regular scheduled work to attend any scheduled meeting with Company representatives, however, in the event such meetings extend beyond the usual working hours or are scheduled outside of the regular working hours, no compensation shall be paid by the Company for time outside of regular working hours and working days.

(b) The Union agrees that insofar as possible, the Local Steward will handle any matters with the local supervisory personnel and not more than three (3) employees (except in the Miami Electric Distribution Department and the System Committee not more than four (4) employees) will be allowed time off without loss of

pay under this paragraph.

### ARTICLE V

### HOURS OF WORK—WORKING CONDITIONS— RATES OF PAY

### 52. EMPLOYEES—PROMOTIONS OR POSITIONS OUTSIDE AGREEMENT—REINSTATEMENT

Any employee accumulating seniority rights under Agreement between the parties hereto, who has been or who may in the future be promoted to or assigned to a position in the Company not covered by this Agreement, shall upon his retirement in good standing from said position be reinstated to his former position, or one equivalent thereto or to a lower position, with full seniority rights (just as though he had continued to work under the Agreement) in the department of the Company in which he was formerly employed, provided he presents himself for reinstatement within thirty (30) days from the date of his retirement from said position, and is still qualified both physically and mentally and has the skill and other qualifications to perform the work required. During the period of such promotion or assignment, the employee shall not have a right to bid on jobs covered by this Agreement. Retirement may be effected upon request of either the employee or the Company.

### 53. EMPLOYEES' ADDRESSES

All employees covered by this Agreement shall keep their working headquarters informed at all times of their home or living quarters address so that they may be reached promptly in the event of an emergency requiring their services.

### ARTICLE VI

### TERM, EXTENSION AND MODIFICATION

### 54. APPROVAL, EFFECTIVE DATE AND TERM

(a) This Agreement, as amended, when signed by the Company and the Union and

### 55. CHANGES AND TERMINATION

Either party may request changes in this Agreement or may terminate this Agreement on September 30, 1969 or on any September 30 anniversary date thereafter by notifying the other at least sixty (60) days prior to September 30, 1969 or September 30 of any year thereafter.

### EXHIBIT 'A'

### HOURLY WAGE SCHEDULES

### Production Department System Operation

Classification	.,	9-2 Min.	4-65 Mair.		cthre 6-68 Max.		S-69 Max.	Jacrease Each
Division Load Dispotcher	(ME) (S)	\$4,47						6 Max
Division Load Dispotcher	(we) (s)	34,47	\$4.63	\$4,64	\$4.80	\$4.81	\$4.97	44
(PG-SN-WB) (S). Substation Operator (S)		- 4,21 2,76	4.47	4,48	4,64	4.65	4,81	44. 5e
PLANT OFFRATION	. :							
Watch Engineer (AA) Control Contar Operator Switchboard Operator Switchboard Operator (S) Fireman (S) Boiler Attendant (S) Awxillary Equipment Oper	(8).	\$4,27 4,01 3,76 3,76 2,76 2,65 3,08	\$4.43 4.17 3.96 3.96 3.96 3.81 3.36	\$4,44 4,18 2,93 3,93 3,93 3,82 3,18	\$4,50 4,34 4,13 4,13 4,13, 2,98 3,46	\$4.61 .4.35 4.10 4.10 4.10 3.99 3.21	\$4.77 4.51 4.30 4.30 4.30 4.15 3.56	4e 4c 5e 5e 5e 4e 4e
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PLANT MECHANICAL MAINTENANCE AND CONSTRUCTION									
Maintenance Foreign		\$4,27	\$4:43.	\$4,44	\$4,60	34,61	\$4,77	44	
Machinist .		3.90	4.06	4.07	4.23	. 4.24	4.40	44	
Mechanic .		3.76	3.96	3.93	4,13	4.10	4.30	54	
Apprentice Machanic		3,08	3,36	2.18	3.46	3.28	3.56	44	
MANT ELECTRICAL MAINTENANCE AND CONSTRUCTION								•	
Chief Electrician		\$4.27	\$4,43	. SLAE	\$4,60 -	\$4.61	\$4.77	44	
Electricion		3.76	3.96	2,93	4.13	4,10	4.30	Se.	
Apprentice Electrician		3.bt.	3.36	3,18	3.46	3.28	3.56	44	
(1) PLANT RESULTS									
Instrument Mechanic	*	\$3.76	\$3.98	\$3,93	\$4,13	44 10	-\$4,30	Se	
Apprentice Instrument Mechanic		3.02	3.36	3.16	3.46	3.28	2,56	44	
ITINIDANTS ".				4			-,00		
Hinarant Mechanic *		****							
Itinerent Apprentice Machanic		\$3.76	\$3.96	\$3.93	\$4.13		-\$4,30	Se	
Irinerant Electrician		-	3.36	- 3.18	3.46	3.28	3,56	46	
linerant Apprentice Electricina			3.96	3,93	4.13	4.10	4,30	5¢	
Hasrant Instrument Mechanic		3,08	2.36		. 3.46	3,28	3.56	48	
Ifforent Apprentice Instrument Mech			3.96	3.93	4.13	4.10	4,30	34	
	mirric	3,08	3,36	3.18	- 3,46	3.28	3.56	-44	

Page Sing-T

Fage Siat	Classification -	9-2	dire 4-66 Max.		dire 6-68 Max.		octiva . 15-69 . Alax	Incree: Each 6 Mas
y-Four	Operations Clerk "A" Operations Clerk "B" Operations Clerk "B" - Sieso	\$3,43 . 2.89 2.89	\$3.55 3.01 3.01	\$3.53 2.97 2.97	\$3.65 3.09 3.09	3.05	\$3.75 3.17 : 3.17	4¢ 4¢ 4¢
		CLASS "	A" PLA	NTS ·	•			
	Plant Foreman (S) Wolch Engineer (A) (S)	3.76	\$4.32 3.96	\$4,33 3,93	\$4,49 4.13	*\$4.50 4.10	\$4.66 4,30	46
		. GE	NERAL			**	": -	
	Mobile Unit-Forenan (S) Mobile Unit-Watch Engineer (S) Gordenor Truck Driver Helper Helper Jonitor Watchman	\$4,27 3,76 2,57 2,47 2,31 2,15 2,15	\$4,43 .3.96 2.77 2.67 2.61 2.35 .2.35	. \$4.44 3.93 2.65 2.55 2.39 2.23 2.23	\$4.60 4.13 2.85 2.75 2.69 2.43 2.43	2.63	\$4.77 4.30 2.93 2.83 2.77 2.51 2.51	. 4¢ 5: 5: 5: 5: 5: 5: 5:

Note (1) — It is understood that the Plant Engineers, formerly called Botterment Engineers, will not perform work in the Barraining Unit. In this connection, it is understood that water tasing cloculation of station persons cate, the making of efficiency and performance tests on plant equipment, and elected work in connection therewish may be performed by Non-Barraining Unit persons of the Connection therewish may be performed by Non-Barraining Unit persons of the Connection therewish may be performed by Non-Barraining Unit persons of the Connection therewish may be performed by Non-Barraining Unit persons of the Connection therewish may be performed by Non-Barraining Unit persons of the Connection therewish may be performed by Non-Barraining Unit persons of the Connection that the Connection of the Connection

### EXHIBIT 'A'

### HOURLY WAGE SCHEDULES

### Transmission-Distribution Department Maintenance and Construction

		m'm's		4-66	Effe 4-0	clive 5-68		ctive 5-69	tacrease Each	
		Classification	Min.	Max.	Min.	Max.	Min.	Max.	. 6 Mec.	
			OVERH	EAD LINE	s					
×		· Line Foresson	\$4.27	\$4.43	\$4,44	\$4.60	\$4.61	\$4.77	. 44	
		(1) Working Foreman	4.20	4.36	4.37	4.53	4.54	4.70	44	
		Labor Foreman	. 3.76	. 3.96	3.93	4.13	4.10	4.30	54	
		Lineman	3.80	4,00	3,97	4.17	4.14	4,34.		
		Apprentice Lineman	3.08	3,36.	3.18	3,46	3,28	3,56	4¢	
	3		*							
		ELECTRICAL	. UNDE	RGROUND						
- 3		Network Maintenance Man	\$4.01	\$4.17	\$4.18	\$4,34	\$4.35	\$4.51	40	
ě	Ē.	Cable Splicer	3.98	4.18	4.15	4.35	4,32	4.52	. 52	
- 5		Electrician	3.76	3.96	3.93	4.13	4.10	. 44.30	5¢	
2	Maria	Street Ligh! Maintenance Man	3.80	4.00	. 3.97	4.17	4.14	4.34	Sc	
- 3		Apprentice Cuble Splicer	3.29	3.57	3,39	3.67	3.49	3.77	40	
			- 6							

ž.	-	9-	24-66		06-68	Elfo	ctive .	Increases
E MECHANICAL		Min.	Mex.	Min	Wax.	Min,	5-69	Each
Construction Foreman						. , min.	Max,	6 Mas.
F. Lobor Forence		\$4,27			\$4.60	\$4:61	\$4.77	. 44
Repuirman "A".		3.76			4.13		. 4,30	-
(2) Repelemen !'B"		3.76	3.96.	3,93		4.10	4,30	Se .
		3.08	3.36	3,18	3.45	3.28	3,56	
			ETER				3,36	. 44
Meter Foreman		\$4.27						
Laboratory Foreman		3,90	\$4.43	\$4.44	\$4.60	\$4.61	\$4.77	4e
Meterman "A"		3.76	4.06	4.07	4.23	4.24	4,40	44
Apprentice Metermon .			3.96	3.93	4.13	4.10	4.30	Se
Metermon "B" -		3.08	3.36	3.18	3.46	3.28	3.56	40
Moter Installer		3.08	3.36	3.18	3.46	3.28 .	3.56	44
		2.89	3.01	2.97	3.09	3,05	3.17	
		· SURSY	ATIONS	:			0.17	. 46
(3) Substation Maintenunce Fo	remun .	.\$4,27						4.
(1) Working Foreman		4.20	\$4.43	\$4.44	\$4.60	\$4.61 \$	4.77	40
. Electrician .		3.80	4.36	4.37	4.53		4.70	40
*Patrolman			4.00	3.97	4.17		4.34	· Se
Apprentice Electrician		3.08	3.96	3.93	4.13		4.30 .	Se .
		3.08	3.36	3.18	3.46	3.28 :		44
								76
***								
	•	Effect	then	***				
Classification		9-24		Effect 4-66		Effectiv		Increase
Cambritished		Min.	Max.	Min.	Max.	4-05-6 Min. 1	Max.	Eoch
		RVICE AN			*/02/4	min.	nax.	6 Mas,
Distribution Dispatcher (ME	781							
Distribution Dispatcher (FL-	W#1 /#1		\$4.43		\$4.60	\$4.61 \$	4.77	4e
Assistant Distribution Disput	401 (9)	4.23	4.39	4.40.	4.55 .	4.57	4.73 .	40'
(ME) (S)		. 3.90						
Service Disputcher (DY-FM-S	S-CO1 /81	4.01 .	4,06	4.07.	4.23		4.40	46
Distribution Inspector	a-col (a)			4.18	4.34	4.35	4.51	44
Troubleman (5)		3.90	4.06	4.07		4.24	1.40	4e
Service Dispotcher (PL-SA-SN	-	3.94	4.10	4.11	4.27	4.28	1.44	44
MC-LC-TI-ML) (S)	-CO-5R-	3.76	4					
Service Disputcher (MM)			3.96	3.93	4.13	4.10 4	.30 .	54 .
Servicemen "A"		3.76	3.96	3.93	4.13		.30 .	Se
Dispalcher Clerk		3.80	4.00	3.97	4.17 .	4.14. 4	.34	Se
Operations Clerk "A"		3.50	3.62	3.60	3.72 .	3.70 3	.82	40
C and D Man			3.55	3.53	3.65	3.63 ' 3	.73	44
Servicemen "B"			3.36	3.18	3.46	3.28 . 3	.56	44 .
					3,46		.55	44
Operations Clerk "8"			3.19	3.17	3.29		.39	46
		2,89	3.01	2.97	3.09		.17	44
Operations Clerk "B" Steno		2.89	3.01	2.97	3.09	-	17	44
				-				76

Casificatos	9-2 Mia.	icilre 4-66 Max.	· Effe · 44	Activa X5-68 Alex,	40	ect/re 15-69	Increas Each
Riseront Line Foreman  Binerant Working Foreman (OL)  Idinerant Lobor Foreman (OL)  Idinerant Lobor Foreman (OL)  Idinerant Apprentice Lineman  Idinerant Cobie Splicer  Idinerant Cobie Splicer  Idinerant Construction Foreman  Rinerant Lobor Foreman (Underground)  Binerant Repairman "A"  Idinerant Repairman "A"	\$4.27 4.20 3.76 \$3.80 3.08 3.93 3.29 4.27 3.76	\$4.43 4.36 3.96 \$4.00 8.36 4.18 3.57 4.43 3.96 3.96		\$4,60 4,53 4,13 \$4,17 3,46 4,35 3,67 4,60 4,13	\$4.61 4.54 4.10 \$4.14 3.28 4.32 3.49 4.61 4.10	#4.77 4.70 4.30 \$4.34 3.56 . 4.32 2.77 4.77 - 4.30	6 Max 4e 4e 5e 5e 4e 5e 4e 4e 4e 5e
Foreign Maintenance	3.80 3.08 3.80 3.07	3,36 4.43 4.36 4.00 3,38 4.00 3.19 2.61	3.18 4.44 4.37 3.97 3.18 3.97 3.17 2.39	3.46 4.53 4.17 3.46 4.17 3.29 2.69	4.61 4.54 4.14	4.30 3.56 4.77 4.70 4.34  3.56 4.34 3.39 2.77	5¢ .4¢ .4¢ .5¢ .5¢ .4¢ .5¢ .5¢ .4¢ .5¢ .5¢ .4¢ .5¢ .5¢ .5¢ .5¢ .5¢ .5¢ .5¢ .5¢ .5¢ .5

		rothre 2		ctive		elive .	Increase
Caxification				6-68	40	15-59	Each
	Mins	Max.	Alle.	Max.	Min.	Max.	
TPAN	SFORMER SHE				· mune	SMIGH.	-6 Mos.
Equipment Repair Foremen			TOOL R	DOW			
man benget toteman .	\$4.27	\$4,43	\$4.44	\$4,60	\$4.61	\$4.77	
Working foremen	4.16	4.32	4.33	4.49			44
Repairmen "A"	3.76	3.96			4.50	4.66	44
Repairman "B"			. 3.93	4.13	4.10	4,30	5¢
Apprentica Repairmen	\$3,08	\$3,36	\$3.18	\$3,46	. \$3,28	\$3,56	
Apprentice Repairmen				4	. 40000	4-76	4¢
(Transformer Shop)	3.08	226	. 3.18				
		9,00	9.18	3.46	. 3,28	3.56	44.
- COMMUNICATIO	IN, CONTROL	L AND	PROTECTIV	* CO.	******		
Communications and Battery Man	\$4.27		ROTECTI				
Electricina		\$4,43	\$4.44	\$4.60	* \$4.61	\$4.77	·4e
***************************************	3.76	. 3.96	- 3,93	4.13		. 4.30	
					40.00	,	. 5¢
Million to Warred Street		NERAL					
Winch Truck Operator	\$3.07	\$3,19	\$3,17	\$3.29	\$3,27	#a.aa	
Truck Servicemon (5)	• 3.07	3,19				\$3:39	. 46
Gardener			.3.17	-3.29	3.27	3,39	: 4e
	2,57	2,77	2.65	2.85	2.73	2.93	52
(4) Truck Driver Helper	2,47	2.67	2.55	2.75	. 2.63		
Histoer	2.31	2,61	. 2.39			2,83	5¢
Janitor				2.69	2,47	2.77	· 5t.
Watchman .	4.15		. 2.23	2,43	2,31	2,51	5±
	2.15	2,35	2.23	-2.43	2.31		
"Non-climbing Classification	•				-001	2.51	Se
V-A- 443							
Note (1)			-				

<sup>(</sup>a) Streep as privided in the Economistum of Understanding on Automatic Promotion of Apprentices on Working Foreman Substation Covers dated 4-27-69, the Working Foreman substation crew in the Transplacion-Distribution Department will counsist of a four-cash substation crew in the Transplacion-Distribution Department will consist of a four-cash substation.

Distribution Departus
Journeyman and one A
where than as provided
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during such mansan will
the distribution of
the additional employer
to elimb due to physic
who is unable to elimb
to be a such to the such
to will any additional employ
a working Foressan will
to woman during such per
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the such as the such as the such as the such as
the such as the such as the such as the such as
the such as the s the Company may at a ch Truck Operator or let be in a classification mitations or provided h to physical limitations.

(4) - A Viorking Forman will be in a

Note (2) — Will receive tempor lighting construction duties of a Journey Crew which is not limit

Note (8) — Will not be recuired to work with tools when directing a crew which two (3) Journeymen in addition to himself except for the purpose of last

Note (4) — With the exception of training assistances, employees in this dessification who hands their position in the pay scale bracket,

meral . — A pole hole digrer will be operated by a Journey hole digrer is a separate operation from the trust.

# MEMORANDUM OF AGREEMENT

and changed February 11, 1959, as amended and changed Docember 21, 1960, as amended and changed April 10, 1963, as amended and changed April 10, 1963, as amended and changed February 17, 1967, as amended and changed February 17, 1967, as amended and changed Anustry 18, 1969, and as amended and changed January 14, 1970, by and between the FLORIDA POWER & LIGHT COMPANY, its successors or assigns, (herefrealled the "Company") and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFLCIO ELECTRICAL WORKERS AFLCIO through, its System Council U-4 comprising 28 day of August, 1953, as amended and changed May 20, 1954, as amended an dehanged September 2, 1956, as amended and changed November 2, 1956; as amended and changed November 30, 1957, as amended AGREEMENT, made and entered into this

### LOCAL UNIONS

- Lake City Miami

Fort Lauderdale Punta Gorde -

Sarasota and Brad Daytona Beach . Sanford No.

West Palm Beach

clusive bargaining representative for employees of the Company in the payroll classifications listed in Exhibit 'A' attached here-(hereinafter called the "Union"), as the ex-1263 - Palatka and St. Augustine 1908 -- Cocoa % % %

to, now or hereinafter employed by the Com-pany during the term of this Agreement.

## WITNESSETH:

That the parties hereto agree as follows:

### GENERAL CONDITIONS ARTICLE !

# . RECOGNITION AND REPRESENTATION

lectively through representatives of their own choosing. The Union is hereby recognized as The Company recognizes the right of its employees to organize and to hargain colexclusive collective bargaining repreof work, and other conditions of employment for all employees of the Company working in the classifications listed in Exhibit 'A' attached hereto, except as otherwise provided in Paragraph 8 hereinafter. The Company credited officers, committee or representa-tives of the Union on all matters covered schitative with respect to rates of pay, hours agrees to meet and deal with the duly acby the terms of this Agreement.

## 2. PROBATIONARY PERIOD

All new employees employed in any of the classifications in Exhibit 'A' shall be cona period of the first six (6) months of con-tinuous employment. During such period such sidered employed on a probationary basis for employees shall receive at least the minimum the rate range of the classification in which they are employed. During the probationary period such employees must show an aptitude for the work in which they are

probationary period, the Company may, at its option, transfer, lay off or dismiss such employees. If retained after such period, such employees shall thereafter be considrights and privileges hereunder as such. A probationary employee is neither required to ered regular employees and be entitled to all engaged and the ability and desire to advance to the skilled classifications. During this nor prohibited from joining the Union.

### 3. STUDENT ENGINEERS - EMPLOYEES WITH SPECIAL EXPERIENCE

Agreement for a period in excess of sixmonths at a time. A Student Engineer will not be assigned to any job or classification one time, may be assigned to work with a bargaining unit employee at different occupations within the bargaining unit as part of a training period. While so employed. the terms of this Agreement not shall their employment affect the status of other em-ployees covered by this Agreement, Any fadiyidual Co-op student will not be assigned A reasonable number of Co-on Students, and a number of Student Engineers not in excess of 1% of the bargaining unit at any employees shall neither be affected by to any job or classification covered by this covered by this Agreement for a period in excess of three months. Ruch

A Co-op student is an employee who spending bethe fire year attending a college or university and the remainder of the year working for the Company under the pro-

Page Three

visions of a Co-op Training Program. A Student Engineer is a college graduate or other specially trained full-time employee who is assigned to various duties as outlined above in the course of an orientation-training program.

## 4. MANAGEMENT IN COMPANY

The right to hire, promote, suspend, lay off, demote, assign, reassign, discipline, discharge and reemploy employees and the management of the properties of the Company shall be vested exclusively in the Company, and the Company shall have the right to determine how many men it will employ or retain in the operation and maintenance of its business, together with the right to exercise full control and discipline over its employees in the interest of proper service and conduct of its business, subject to any applicable terms of this Agreement.

# 4.1 COMPANY-FOREMAN RELATIONSHIP

It is agreed that all promotions to and demotions from clessifications in the wage bracket of Distribution Dispatcher (FL-WB) and above, as shown in Exhibit 'A, will not be subject to the arbitration step provided in the Agreement. It is further agreed that employees in such classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory expectly are not to be facked up or disciplined through

Union machinery for the acts they may have performed as upervisors in the Company of not expect or intend for Union members to interfere with the proper and logitimate performance of the Foreman's management responsibilities appropriate to their classification. It is further agreed that the inclusion in the bargaining unit of the employees in the wage bracket of Distribution Dispatcher (FL-WB) and above, and any others who may be in a bona fide supervisory occupant, from having direct communication with steff from having direct communication with steff it they were not included in the bargaining

## S. CONTINUITY OF WORK

. . .

It is expressly understood and agreed that the services to be performed by the employees covered by this Agreement, pertain to and are essential to the operations of a public utility, and to the welfare of the public dependent thereon, and in consideration thereof, and of the agreements and conditional herein by the Company to be kept and performed, the Union agrees that the employees covered by this Agreement will not be called upon or permitted to cease or absening from the continuous performance of the duties pertaining to the positions held by them with the Company, in accord with the terms of this Agreement. The Union further agrees that it will take every reasonable means which are within its powers

to induce employees who are members of the Union and subject to lis discipline who may engage in a strike or work stoppage in violation of this Agreement to return to work prumptly. The Company agrees on list part, to do nothing to provoke interruption of, or prevent such continuity of performance of said employees, insofar as such performance is required in the normal and usual operation of the Company's properties. Any dispute over matters in violation of the terms of this Agreement must be handled in the manner provided by the Grierance and Arbitration Procedure as set forth in Article IV

### ARTICLE VI

### TERM, EXTENSION AND MODIFICATION

# 54. APPROVAL, EFFECTIVE DATE AND TERM

(b) This Agreement shall remain in effect through October 31, 1971. It shall continue in full force and effect from year to year thereafter from October 31, 1971, through October 31 of each year thereafter unless changed or terminated in the way later provided herein.

### EXHIBIT 'A'

### HOURLY WAGE SCHEDULES

### Production Department System Operation

Effective 11-28-70

Classification	Min.	Max.	Min.	Max.	6 Mar.
Division Load Dispatcher (ME) (5) Division Load Dispatcher	\$5.47	\$5.63	\$5.84	\$6.00	44
(PG-SN-WB) (S)	531	5.47	5.68	5.84	44
Substation Operator (5)	4.76	4.96	5.13	5.33	54
PLANT OPERATION					
Watch Engineer (AA) (S)	35.27	\$5,43	\$5.64	\$5.80	44
Control Center Operator (S)	5.01	5.17	5.38	5.54	44
Switchboard Operator (5)	4.76	4.95	5.13	5.33	Sc
Turbine Operator (5)	4.76	4.96	5,13	5.33	5¢
Fireman (S)	4.76	4.98	5.13	5.33	54
Boiler Attendant (S)	4.65	4.81	5.02	5.18	46
Auxiliary Equipment Operator (5)	3.84	4.12	4.13	4.41	46
	*				
		ective .		ectiva	Increase
	12-	30-69		28-70	Euch
Classification	Mln.	Hax.	Min.	Max.	6 Mos.
PLANT MECHANICAL MAINTENANCE AND CONSTRUCTION					
Maintenance Foreman	\$5.27	\$5.43	\$5.64	\$5.80	- 44
Machinist	4.90	5.06	5.27	5.43	44
Mechanic	4.76	4.96	5.13	5.33	54
Apprentice Mechanic	3.84	4.12	4.13	4.41	44
PLANT ELECTRICAL MAINTENANCE AND CONSTRUCTION					
Chief Electrician	\$5.27	\$5.43	\$5.64	\$5.80	ag
Electrician	4.76	4.96	5.13	5.33	34
Apprentice Electrician	3.84	4.12	4.13	4,41	44
(I) PLANT RESULTS					
Instrument Mechanic	\$4.76	\$4.96	\$5.13	\$5.33	5¢
Apprentice Instrument Mechanic	3.84	4.12	4.13	4.41	46
ITIMERANTS					
Itinerant Mechanic	\$4.76	\$4.96	\$5.13	\$5.33	34
Itinerant Apprentice Mechanic	3.84	4.12	4.13 5.13	5.33	34
Itinerant Electrician	4.76 3.84	4.12	4.13	4.41	44
Itinerant Apprentice Electrician	4.76	4.96	5.13	5.33	34
Itinerant Instrument Mechanic Itinerant Apprentice Instrument Mechanic	3.84	4.12	4.13	4.41	44
minerant Apprentice instrument Mechanic	9.04	4.14	-,10	-,	**

	12.	octive 30-69		etive 18-70	Increose
Classification	Min.	Max.	Min.	Max.	6 Mar.
PLANT CLERICAL					U mus.
Operations Clark "A"		****			
Operations Clark "8"	\$4.19	\$4.31	\$4.48	\$4.60	44
	3.53	3.65	3.75	3.87	44
Operations Clerk "B" - Steno	3.53	3.65	3.75	3.87	44
	CLASS "A" PLA	MYS			
Plant Foreman (S)					
Watch Engineer (A) (S)	\$5.16	\$5.32	\$5.53	\$5.69	44
Haloi Engineer (A) (S)	4.76	4.96	5.13	5.33	4¢ 5¢
	CENERAL				
Mobile Unit-Foremen (5)	\$5,27	\$5.43	****		
Mobile Unit-Watch Engineer (S)	4.76	4.96	\$5.64	\$5.80	AL
Gardener			5.13	5.33	5¢
Truck Driver Helper	3.21	2.41	3.43	3.63	54
Helper	3.11	3.31	3.33	3.53	54
	2.95	3.25	3.17	3.47	4¢ 5¢ 5¢ 5¢ 5¢ 5¢
Janitor	2.79	2.99	3.01	3.21	04
Watchman	2.79	2.99	3.01		26
		4.77	3.01	3.21	54

Note (1) — It is understood that the Plant Engineers, formerly called Betterment Engineers, will not perform work in the Bargaining Unit. In this connection, it is understood that water testing, calculation of station performance data, the making of efficiency and performance tests on plant equipment, and cierical work in connection therewith may be parformed by non-Bargaing Unit personnel.

### EXRIBIT 'A'

### HOURLY WAGE SCHEDULES

### Transmission-Distribution Department Maintenance and Construction

	EHe 12-5	ctive 10-69	#Hed 71-2		Increase Each
Classification	Min.	Max.	Alla.	Max.	6 Mar.
	OVERHEAD LIN	155			
Line Foremen	\$5.27	\$5,43	\$5.64	\$5.80	46
(1)Working Foreman	5.20	5.36	5.57	5.73	44
Labor Foreman	4.76	4.96	5.13	5.33	5¢
Lineman	4.80	5.00	5.17	5.37	5¢
Apprentice Lineman	3.84	4.12	4.13	4.41	44
	UNDERGROUN	0			
FLECTRICAL					
Network Maintenance Man	\$5.01	\$5,17	\$5.38	\$5.54	42
Cable Splicer	4,98	5.18	5.35	5.55	54
Electrician	4.76	4.96	5.13	5.33	5¢
Street Light Maintenance Man	4.80	5.00	5.12	5.37	54
Apprentice Cable Splicer	4.05	4.33	4.34	4.62	48

4	MECHANICAL					
V-Six	Construction Foreman	\$5.27	\$5.43	\$5.64	\$5.80	44
~	Labor Foreman	4.76	4.96	5.13	5.33	54
	Repairmen "A"	4.76	4.98	5.13	5.33	Sg.
	(2)Repairman "B"	3.84	4.12	4.13	4.41	44
		METER				
	Meter Foreman	\$5.27	\$5.43	\$5.64	\$5.80	44
	Laboratory Meterman	4.90	5.06	5.27	5.43	44
	Meterman "A"	4.76	4.96	5.13	5.33	5¢
	Apprentice Metermen	3.84	4.12	4.13	4.41	44
	Meterman "B"	3.84	4.12	4.13	4.41	44
	Meter Installer	3.53	3.65	3.75	3.87	45
	The state of the s	SUBSTATIONS				
	(3)Substation Maintenance Foreman	\$5.27	\$5.43	\$5.64	\$5.80	44
	(1)Working Foreman	5.20	5.36	5.57	5.73	46
	Electrician	4.80	5.00	5.17	5.37	34
	*Patrolman	4.76	4.95	5.13	5.33	54
	Apprentice Electridan	3.84	4.12	4.13	4.41	44
	1.1					
				1 1		
			ctive	Effe	8.70	Sacrouse Each
		Alle.	10-69 Max.	Min.	Max.	6 Mos.
	Classification	ICE AND CU		495.00		-
		\$5.27	\$5.43	\$5.64	\$5.80	40
	Distribution Dispatcher (ME) (3)	5.23	5.39	5.60	5.76	AL
	Distribution Dispatcher (FL-WR) (5)	5.23	3.37	3.00	3.5	7
	Assistant Distribution Dispatcher	4.90	5.06	5.27	5.43	At
	(ME) (S) Service Dispatcher (DY-FM-65-CO) (S)	5.01	5.17	5.38	5.54	42
	Distribution Inspector	4.90	5.06	5.27	5.43	44
	Troublemen (5)	4.94	5.10	5.31	5.47	44
	Service Dispatcher (PLSA-SN-SR-MC-LC-	-				
	TI-MU (S)	4.76	4.96	5.13	5.33	5¢
	Service Dispatcher (MM)	4.76	4.96	5.13	5.33	St
	Serviceman "A"	4.80	5.00	5.17	5.37	5¢
	Dispatcher Clark	4.26	4.38	4.55	4.67	45
	Operations Clark "A"	4.19	4.31	4.48	4.60	44
3	C and D Man	3.84	4.12	4.13	4.43	44
3	Serviceman "8"	3.84	4.12	4.13	4.41	44
100	Service Clerk (5)	3.83	3.95	4,12	4.24	AL
10	Operations Clerk "8"	3.53	3,65	3.75	3.87	40
Page Sisty-Sever	Operations Clark "B" - Stano	3.53	3.65	3.75	3.87	42
3	Operations Clerk "8" - 5reno	9,00	5.05			

	Elfective 12-30-69			Effective 11-28-70	
Classification -	Min.	Max.	Alle.	Mex.	Equi
TRANSFORME	SHOP AND	TOOL ROO	DAM .		
Equipment Repair Foreman	\$5.27	\$5.43	35.64	\$5.80	44
Working Foreman	5.16	-5.32	5.53	5.69	44
Repairman "A"	4.76	4.96	5.13	5.33	54
Repairman "B"	3.84	4.12	4.13	441	44
Apprentice Repairmen (Transformer Shop)	3.84	4.12	413	4,41	5¢ 4¢ 4¢
COMMUNICATION, CON	TROL AND P	ROTECTIVE	EQUIPMENT		
Communications and Battery Man	\$5.27	\$5.43	\$5.64	\$5.80	44
Electrician	4.76	4,96	5.13	5.33	54
1	GENERAL				
Winch Truck Operator	\$3,83	\$3.95	\$4.12	34.24	44
Truck Servicemen (5)	3.83	3.95	4.12	4.24	44
Gardener	3.21	3.41	3.43	3.63	54
(4)Truck Oriver Helper	3.11	3.31	3.33	3.53	54
Helper	2.95	3.25	3.17	3.47	54
Janitor	2.79	2.99	3.01	3.21	5¢ 5¢ 5¢ 5¢ 5¢
Watchman	2.79	2.99	3.01	3,21	54
* Non-Climbing Classification	-		-	-,	-

Note (1)

(a) — Except as provided in the Memorandum of Understanding on Automatic Promote prentices on Working Foreman Substation Crews dated 4-27-32, the Working Foreman substation eraw in the Transmission-Distribution Department will consist of

# ARTICLES OF INCORPORATION OF I B E W SYSTEM COUNCIL U-4

DEATH BENEFIT FUND, INC.

The undesigned subscribers to these articles of incorporation, each a natural person competent to contract, hereby associate themselves together to form a corporation not for profit under the laws of the State of Florida.

### ARTICLE I - NAME

The name of this corporation is: I B E W SYSTEM COUNCIL U-4 DEATH BENEFIT FUND, INC.

## ARTICLE II - PURPOSE

The general nature and purpose of this corporation shall be to protect, provide for and contribute immediate assistance to the families, widows, children or beneficiaries of its members upon the death of any member by providing a death benefit fund payable to such beneficiary as the member may designate.

# ARTICLE III - MEMBERSHIP

The membership of this corporation shall consist of the original subscribers named herein and such other individuals that have been and shall be elected or added from time to time as provided by the by-laws, provided, however, no person shall become a member of this corporation who is not a member of this corporation who is not a member of this corporation who is not a member of this corporation of a Electrical Workers Local Unions, AFL-CIO, which comprise the Florida

Power and Light Company System Council or the spouse of said member, or the widow or vidower of said member, if he or she was a member of the Fund before and since his or har death.

The by-laws of the corporation may fix and after the number of members, provided the rampler shall not at any time be less than five. The by-laws may also provide for the expulsion of members.

ARTICLE IV - TERM OF EXISTENCE This corporation is to exist perpetually.

ARTICLE V — SUBSCRIBERS.

The names and residences of the original.

subscribers and charter members of the corporation are as follows:

| E. HOSFORD | Lake Gity, A. MOORE | Hollywood | H. MEIER | Miami, J. ISEMAN | Fort Pierce,

HARRY L. HUFFMAN Punta Gorda, B. B. BAKER Fort Lauderdale, J. E. BRYAN Venice, RALPH H. HUBBARD Sanford.

H. M. THOMAS Daytona Beach, Fla.
M. E. AURANTS West Palm Beach, Fla.
R. S. L.:ROCHE Palatka, Fla.
GENE CRAWFORD Coon, Fla.

## ARTICLES VI — OFFICERS AND DIRECTORS

The affairs of the corporation shall be man aged by a Preislant, Vice-President and Secretary-Treasurer who shall be elected from from among the Directors at the first regular miceting or a special meeting, called for that purpose, of the Board of Directors. The Officers shall serve at the will of the Board of rectors shall serve at the will of the Board of rectors shall be the duly elected Financial Secretary of each Local Union, the duly elected President and the duly elected Treasurer of 1 E E W System Council U-4. The torus of offices and Directors shall be concurrent with their terms of aforesid of the Local Unions or System Council.

# INITIAL OFFICERS AND DIRECTORS

The names and addresses of the officers who are to serve until the first election under articles, of incorporation are as follows:

President and Director from System . Council U-4

. 112 Mary Street, Daytona Beach, Florida Vice-President and Director from

Local Union 759 C. O. HILLMAN 1804 N.W. 16th St., Fort Lauderdale, Fig. Sec'y.Treas, from Director from System Council U-4
AUGUSTUS FORTNER
P. O. Box 154, East Palatka, Florida
Director from Local Union 359
E. T. STEPHENSON
E. T. STEPHENSON

13301 N. E. 1st Avenue, Miami, Florida Director from Local Union 622 ARNOLD R. SOVA 631 Cherry Drive, Lake City, Florida J. Director from Local Union 627 B. L. JENNINGS

Route 4, Box 406, Fort Pierce, Florida Director from Local Union 641 CARL E. EVERS Route 4, Box 340, Fort Myers, Florida

Director from Local Union 820 H. R. BARRICK 2165 Cass Street, Sarasots, Florida Director from Local Union 1042 C. A. JOHNSON

P. O. Box 135, Lake Monroe, Florida
Director from Local Union 1066
A. R. KULL
121 Florning Street, Port Orange, Florida
Director from Local Union 1911
FRANK CALLEBOUT
831 - 31st Street, West Palm Beach, Florida

Director from Local Union 1263 D. E. NIPPER R.F.D. #1, Box 376, East Palatka, Florida

Director from Local Union 1909 E. M. CRAWFORD 2405 Cherbourg Road, Cocoa, Florida

## ARTICLE VIII - BY-LAWS

The by-laws of this corporation shall be made, altered or rescinded by a two-thirds vote of the Directors present and voting at any regular meeting of the Directors or at a special meeting calld for that purpose, in which latter case, notice of the proposed change shall be given in writing to each director thirty days prior to such meeting or as otherwise provided by the by-laws.

## ARENDMENTS TO ARTICLES OF INCORPORATION

Amenoments to the articles of incorporation may be proposed and adopted by a two-thirds vote of the directors present and voting at any regular meeting of the Directors or at a special. neeting called for that purpose, in which latter case, notice of the proposed change shall be given in writing to each director thirty days prior to such meeting.

### ARTICLE X - POWERS

The greatest amount of indebtedness or ability to which this corporation may at any time subject itself shall never be greater than

two-flirds of the value of the property of this corporation.

This corporation shall have the power to purchize, own, hold, build upon, rest, and/or cashe property, real, personal or mixed; to receive by gift, devise or bequest, property of any cularacter whatsover, and no matter where situate; to sell, convey, mortgage or of herwise dispose of any property in any manner acquired by it and at any time; to contract, sue and he sared in its corporate name; to have a corporate seel; to adopt, amend, repeal or alters such by-laws as may from time to time be adopted by the corporation.

### FATE OF FLORIDA

COUNTY OF VOLUSIA

John E. Barrett, President; C. O. Hillman, Vice-president, and Augustus Fotner. Secretary Tre. Jarrett, heing first duly sworn by me, the undersigned authority, do state on oath that the above certificate was approved at a dely authorized meeting of the Board of Dincitors on the 2nd day of December, 1961, acretary cailed for the purpose of reincorporative valee Florida Statutes (17012, the charter of the System Council Death Benefit fund, 1976, which was approved by Circuit Judge in and for Dade County, Florida, Ray Peurson on May 14, 1856, and filed for record and day recorded in Corporation Book 82 on page 534, File Mo, FF130709, by E. E. Leather man, Gert, Circuit Court in and for Dade County, Florida, and such documents constitute vogics of the charter of the corporation

and all amendments thereto and that the above certificate is intended to be the certificate containing the provisions required in original articles of incorporation by Florida Statutes 617.013 with the intent of accepting the provisions of Florida Statutes 617 as amended: whereupon this certificate shall become the acriticles of incorporation.

/s/ John E. Barrett, President

ATTEST

/s/ Augustus Fortner, Secretary-Treas. Sworn to and subscribed before me this 2nd day of December, 1961

/s/ Vincent F. O'Reilly, (Seal)

Notary Public, State of Florida My Commission Expires July 15, 1964. Li Con Adams, Secretary of the State

1, Ton Adams, Secretary of the State of Florida, do hereby certify that the above and foregoing is a true and correct copy of CERTIFICATE OF REINCORPORATION OF I IS W SYSTEM COUNCIL U-4- DEATH RENEFT FUND, INC., a corporation not for profit, organized and existing under the Laws of the State of Florida, filed on the 10th day of January, A. D., 1962, as shown by the records of this office. Given under my hand and the Great Seal of the State of Florida at Tallabassee, the Capital, this the 10th day of January, A.D.

1952. (s) Tom Adams
Secretary of State
(Great Seal of the State of Florida)

### BY-LAWS

### I B E W SYSTEM COUNCIL U.4 DEATH BENEFIT FUND, INC.

ARTICLE 1 — OFFICERS AND

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1. The officers of I B E W SYSTEM COUN-CIL U-4 DEATH BENEFIT FUND, INC., shall be as follows: President, Vice-President and Secretary-Treasurer.

2. The office of the Secretary and Treasurer that he combined and the Secretary shall discharge all of the duties of the office of Treasurer, and shall be bonded.

3. All Officers and Directors shall serve vivilout pay or renuncration; however, the President and Secretary-Treasurer shall be reinbursed by the Fund for wages and expenses incurred in the operation of the Fund. The other Directors shall be reimbursed by the Fund for expenses incurred in the operation of the Fund. Any salaries of the operation of the fund, Any salaries of the other Directors may be paid by the Local Union or System Council they represent.

4. The Fund shall be under the general control, experision and management of a Board of Directors consisting of the duly elected Francial Secretary of each Local Union, the duly elected President and the duly elected Trausure of I B E W System Council U-4. Three of the said directors shall be the officers designated in Section I bareof, and they shall compose an Executive Board which shall

control, supervise and manage the Fund between the meetings of the Board of Directors, subject to the approval of the Board of Directors.

5. The Terms of Office of Officers and Directors shall be concurrent with their terms of aloresaid office as Financial Secretary of a Local Union, or President or Treasurer of I B E W System Council U-4.

6. Election to the Board of Directors shall be held in accordance with the Constitution and Dy-Laws of IB E W System Council U4 or appropriate Local Union. Election of Of ficers shall be held at the first regular meeting, called for that purpose of the Board of Directors. The Officers shall serve for a term at the will of the Board of Directors.

at the will of the Board of Directors.

7. In the event of the resignation death or incapacity of one of the Officers, the Exceutive Board and Directors. In the event of a like vacancy on the Board of Directors in the event of a like vacancy on the Board of Directors the Executive Eoard may fill the vacancy from a member of the Fund until the Local Union or System Council elects a successor in accordance with its by-laws.

### ARTICLE II - MEETINGS

1. The regular meetings of the Board of Directors shall be held at the same time as the regular meetings of the Financial Secretaries of the System Council. Special meetings nay be held at the discretion of the President, or at the discretion of a majority of the Director, after notice in writing mailed to each special meeting.

2. Meetings of the Executive Board may be called by the President or by request of a majority of the Officers.

3. No business shall be transacted at any meeting without a quorum consisting of a ma-

birthday shall pay an initiation fee of One Hundred Dollars (\$100.00). A divorced spouse shall not remain a member of the Fund. Any constitution paid to the Fund in behalf of a divorced spouse after the effective date of the divorce shall be returned to the purty making 1. The membership of this corporation shall consist of members in good standing of one of the international Brotherhood of Electrical Workers Local Unions, AFT-CIO which comprise the Florida Power and Light Company System Council, the spouse of a member of the Fund or the widow or widower of said member if he or she was member of the Fund shall pay on initiation fee of Five Dollars \$5.60). Applicants who have reached their 50th before and since his or her death, who each ARTICLE III - MEMBERSHIP ority being present. the contribution.

instated by filing application with the Secre-tary-Treasurer and paying all assessments due 2. Any member who has been suspended or non-payment of assessments may be resince the Jate of his suspension.

3. The suspension of any member may be reviewed upon petition filed with the Secrefary. Treasurer, A hearing on said petition shall be held at the next meeting of the Board of Directors after receipt of said petition by the Secretary-Treasurer.

## ARTICLE IV - BENEFICIARIES

cipating party, mailing address, city of residence, primary beneficiary and contingent henficiary, if such exist, and give their addresses. One copy, the original, will be given to he participating member of the Fund and the duplicte copy will be kept in the files of the Secretary-Treasurer of the Fund. 1. The Secretary-Tressurer shall issue to each member of 1 B E W SYSTEM COUN.
CIL U-4 DEATH BENEFIT FUND, INC., a printed form showing the name of the parti-

shall be issued to him, and all previous certi-ficates shall, thereby become null and void No vested rights shall ever accrue under a Certificate contrary to the expressed designstherefor, which request shal be witten request therefor, which request shal be witnessed by two disinferested witnesses and acknowledged before a notary public or like officer. Upon receipt of said request by the Secretary-Treasurer, a new certificate of membership, with the The designated beneficiary my be changed at the pleasure of the member at any time name of the new beneficiary therein stated ion of the member.

3. Under no circumstances will any assignment, pledge or sale of the Certificate of Membership be recognized.

4. In case all the designated beneficiaries shall predecease the member, and the memperses which the Fund may have incurred for the benefit of the deceased member during his ter shall die without having designated a new Seneliciary, then and in that event the amount to be contributed, after deducting any perses which the Fund may have incurred

inst illness or for his funeral expenses, shall be contributed to the heirs at law or the legates of such deceased member, according to the laws of the State of Florida.

### ARTICLE V - PAYMENTS

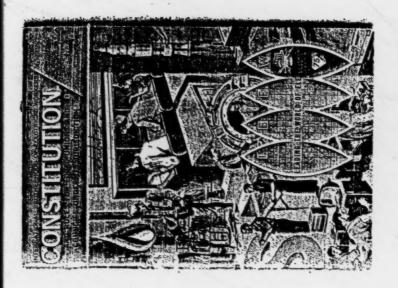
1. Upon receiving satisfactory notice of the death of a member of I B E W SYSTEM COUNCIL U-4 DEATH BENEFIT FUND, INC., the President and Secretary Treasurer shall immediately forward to the beneficiaries designated in the Certificate of Membership, if living, and if the designated beneficiaries be dead, to the heirs at law, or legatees of such deceased member, if known, a check for such deceased member, if known, a check for such deceased member, if known, a check for such demas as may be usually contributed by the Fund under the provisions of these by laws.

2. The beneficiary or beneficiaries of the deceased member of the Fund shall receive benefits of One Dollar (\$1.00) times the number of the Fund in good standing on the last day of the month prior to the death.

as In addition to the Five Dollars (\$5.00).

3. In addition to the Five Dollars (\$5.00) initiation fee as berein provided, upon the death of any member of the Fund, each member and contribute the sum effort sollar (\$1.00); however, upon the death of each tenth member of the Fund, the Board of Directors may asses an additional One Dollar (\$1.00) to be used for operating expenses of the Fund.

penses of the Fund, shall be promptly given a. Notice of death shall be promptly given by the Secretary of each Local Union, who shall notify each member, and the contribution as above mentioned, shall be payable to the



### NAME AND CONSTITUTION ARTICLE.

defined in Article XXVIII of this Constitution, in-cluding all workers in public utilities and electrical manufacturing plants, and shall consist of an unlimited number of local unions acknowledging its jurisdiction and subject to its laws and usages, and it shall not be dissolved while there are five dissent-Sec. 1. This organization shall be known as the International Brotherhood of Electrical Workers, with jurisdiction over all electrical workers as ing local unions.

Sec. 2. This Constitution, and all acts and proceedings which, in the future and in due course may be enacted, shall be absolutely binding on all the Sec. 8. The following abbreviations, when used herein, and in reports and other documents, shall

I.B.E.W.-International Brotherhood of Electrical

I.E.C.—International Executive Council Workers.

I.V.P .- International Vice President. I.S .- International Secretary.

E.W.B.A.-Electrical . Workers' Benefit. Associa-I.T.—International Treasurer.
I.R.—International Representative.
I.C.—International Convention.
I.O.—International Office.

R.S.—Recording Secretary.
F.S.—Financial Secretary.
F.S.—Financial Secretary.
F.S.—Thancial Secretary.
F.S.—Thancial Secretary.
F.S.—Thancial Secretary.
F.S.—Thancial Secretary. LU-Local Union.

In continuous good standing with twenty. (20) or .

more year: inmediately preceding his spplication more year: spinateliar between the age of sixty-five (65) years shall receive pension benefits computed on the basis of two dollars (\$2.00) per month for each full year of such continuous "A" membership. In no event shall any "A" member retired under this Section 1(a) be paid a monthly pension benefit less than he would have received under the pension benefit provisions of the Constitution prior to January 1,1967.

(b) Disability Persion. An "An member of the IBEW who is totally disabled and has continuous good standing of twenty (20) or more years immediately preceding his application shall receive disability pension benefits, if such application, is approved, computed on the basis of two dollars (\$2.00) per month for each full year of such, continuous. "A" membership.

A Benefits will be paid only after six (6) whole calendar months from the date of commencement of total disability provided that no period of total disability provided that no period of total disability morphisms of the considered to commence before the "A" member has completed twenty (20) or more years in cominnous good standing, or before Jan-

uary 1, 1967, whichever occurs last.

(2) The applicant for disability pension benefits must maintain his continuous good standing as an "A," member until, the date of approval of his application by the LEC. and shall, in the event of such approval, receive a full retund of LC dues from the date of commencement of his total disability. The period following the commencement of total disability a shall not be counted in computing the amount of disability pension benefit.

(c) Vesting. An "A" member who has completed fwenty (20) or more years of "A" membership in continuous good standing and who censes being an

### PENSION BENEFIT FUND

Sec. 1. An "A" member who retires from the electrical frade after January 1, 1967, shall be entitled to benefits in accordance with the following rules as to eligibility:

(a) Normal Pension. An "A" member of the IBEW

five (55) shall retain a vested right to pension benefits be not to disability pension benefits but not to disability pension benefits or death benefits. This vested right will entitle him to receive, benefits at age sixty-five (65), pension benefits computed on the basis of two dollars (\$2.00) per month for each full year of such contratuous 'A' membership less two dollars (\$2.00) per month for each year or part thereof the said "A" member was under the age of sixty-five (65) at the date his "A"

membership terminated. Upon the death, after 3ec. 2. Dachs Berefits. Upon the death, after 5ac. 2. Dachs Berefits of a non-retired "A" member who then has at least six (6) months continuous and active good standing, the beneficiary named by the "A" member to receive the death benefits payable under this paragraph shall be paid the sum of one thousand fatural causes or the sum of two thousand (\$2,000.0) dollars if the said "A" member died from the sum of two thousand (\$2,000.0) dollars if the said "A" member died by accidental means. Upon the death from either natural causes or accidental means of an "A" member retired under Section 1(a) or 1(b) after Banuary 1, 1967, the beneficiary named by the "A" member receive the death hengits shall be paid a sum computed by subtracting from one thousand (\$1,000.00) puted by subtracting from one thousand (\$1,000.00). Acoustic all pension benefits paid by the I.B.E.W. Pension Renefit Fund to the retired member, his beneficiary or his estate. The death benefit provided by this section shall be in addition to the death benefit benefits provided by the Electrical Workers Benefit As-

fits provided by the Electrical Workers Benefit Association or the I.B.E.W. Death Benefit Fund. (For rules governing who may be named a beneficiary, see Article XIII, Section 2, pages 36-38. The beneficiaries recorded under the EWBA or Death Benefit Fund will also receive any death benefits provided by the Pension Benefit Fund, unless a different beneficiary for I.B.E.W. Pension Benefit Fund Pension Benefit Fund Pension Benefit Fund Pension Porth Benefits' form.)

Sec. 3. Pension Benefits of "A" members retired. prior to January 1, 1967. The pension benefits of an "A" member of the I.B.E.W. who has retired from the electrical trade and was placed on the pension rolls prior to January 1, 1967, are as follows:

(a) Each "A" member so retired prior to June 1, 1967, shall continue to receive the fifty (\$60.00) dol. Jar. monthly pension benefit from the I.B.E.W. Pension Benefit Trust Fund under the Employees Benesian Rereement, as heretofore, provided that, if for any reason whatsovers, such payment is not made by the said 'I.B.E.W. Pension Benefit Trust Fund then the said fifty (\$50.00) dollar monthly pension. Denefit shall by paid by the I.B.E.W. Pension Renefit

(b) Each "A" member so retired from and after June 1, 1957, to December 31, 1951 shall continue to receive the fifty (\$50.00) dollar monthly pension benefit from the I.B.E.W. Pension Benefit Fund, as heretofore.

(c) Each "A" member so retired from and after January 1, 1962, who January 1, 1962, who is a banuary 1, 1962, who is not covered by the Employees Benefit Agreement shall continue to receive the fifty (\$50.00) collar monthly pension benefit from the I.B.E.W. Pension Benefit Fund, as heretofore. Any such "A" member 1.B.E.W. Pension Benefit Agreement shall continue to receive a monthly pension benefit frust Fund under the Employees Benefit Agreement shall continue to receive wall be entitled to receive a twenty-five (\$25.00) dollar monthly pension benefit from the I.B.E.W. Pension Benefit Fund retroactive to January 1, 1956. If for any reason whatsoever the payment of the monthly pension benefit from the I.B.E.W. Pension Benefit Fund retroactive to January 1, 1956. If for Funt Fund under the Employees Benefit Agreement is not made to the latter group then the fifty (\$50.00) dollar monthly pension benefit aftall be pald by the I.B.E.W. Pension Benefit aftall be pald by the I.B.E.W. Pension benefit shall be pald

Sec. 4. General Provisions.

(a) "Continuous Good Standing." Any pariod of memberahip used in determining eligibility or in computing benefits shall include only consecutive years of "A" memberahip in good standing in the J.B.E.W. except that years of memberahip when on pension or disability pension shall not be counted? Provided further that, if a member who has been Provided further that, if a member who has been and "A" memberahip, a benefit based on the period of contral or a memberahip at the electrical trade and "A" memberahip, a benefit based on the period of continuous "A" memberahip after such return shall be addeed to the amount of his previous normal pension, disability pension, gv vested pension right.

(b) Waiver. Any member who desires to waive any portion of his pension, either monthly or yearly, may do so by notifying the L.S. Any pension so waived will not be returned to the pensioner at a later time.

(c) Per Capita Traz of Members on Pension, Discobility Pension or With Vested Pension Rights, The I.S. shall pay from the Pension Benefit Fund the portion of the per capita tax owing to the Electrical Workers Benefit Association or to the I.B.E.W. Death Benefit Fund from each "A" member on the pension role scope frembers who have been granted vested pension rights, and as provided for in the Employees Benefit Agreement, first made September 3, 1946. All other portions of the per capita tax otherwise owed by said "A" members to the I.B.E.W. Are hereby waived.

(d) Prolabition of Work: It is a condition for admission to pension benefits, including vested pension rights and the continuation thereof, that the member shall not perform any work of any kind

comping under the I.B.E.W.'s furisdiction either for compensation or gratils for anyone. He shall be permitted to attend I.U. meetings without voice or vote. He shall observe his obligation of membership and show due obedience to I.B.E.W. have, and the bylaws of its L.U.'s.

(e) Non-Assignment of Benefits. No member, pensions to beneficiary shall have the right to assign, transfer, sell, mortgage, encumber or pledge any pension or death. benefits, and such assignment, transfer, sale, mortgage, encumbrance or pledge shall be void and of no effect whatsoever. So that such benefits shall not in any way be subject to, any legal process, execution, attachment or garnishment or be used for the payment of any claim against any member, pensioner or beneficiary, or be subject to vency proceedings by operation of law or otherwise, the LE.C. shall have the right to postpone any payment under this Plan to a pensioner or beneficiary.

(f) Interpretations, Definitions and Decisions. The LE.C. is authorized to make definitions and Decisions. The terms used in this article of the Constitution and to make interpretations of these constitutional provisions and its Rules and Regulations which shall be final and binding. The decisions of the LE.C. on all questions actions assisting hereunder, including cases of eligibility for, and computation of the amount of, benefits, shall be final and binding.

No benefits are authorized other than those expressly stated in the I.B.E.W. Constitution and the Rules and Regulations of the I.E.C.

Sec. 5. Members on withdrawal cards who have maintained their continuous good standing in the I.B.E.W. and who make application for pension benefits, shall be governed and their applications handled in the same manner as active members of L.U.'s, except that notice of application shall be given to the L.U. in the jurisdiction where the applicant resides and to the L.U. that issued the with any averal earl to the member, to all out hands on the application.

Sec. 6. Any member violating siny of the provisions of this article, or any member aiding or abotting a member to do so, after investigation by the LE.C. and being found guilty, may be permainedly harred from ever participating in these benefit, and may be suspended, expelled, or assessed as the LE.C. may decide.

LE.C. may decide.

Sec. '7. The procedures for applications for benefits and for making determinations thereon shall be as prescribed in the Rules and Regulations of the LE.C.

# ARTICLE XXVI WITHDRAWAL CARDS— PARTICIPATING AND HONORARY

'Sec. 1. Any member who becomes a general manager of superintendent, or who retires from his trade, may apply to the F.S. for a withdrawal card. It shall require a majority vote at a meeting to grant such card. L.U. has the right to require anch. armenber to take out a withdrawal card. If it so decides.

Sec. 2. Any member receiving a participating withdrawal card and desiring to maintain his standwing in the LB.E.W. shall deposit the deplicate por-

tion of the withdrawal card in the I.O. and pay his assessments, and he shall be entitled to all benefits of the I.B. W. as long as he complies with its laws and maintains his continuous good standing. The participating withdrawal card shall not entitle the participating withdrawal card shall not entitle the holder to any L.U. neeting. Upon returning to the trade, the recipient of this card shall deposit it in the I.U. which issued it. No member on participating withdrawal card is entitled to notice of any payments the the I.O.

Sec. 3. Any member not desiring to maintain his standing, who retires from the trade or is unemployed, or in such other cases as may be decided by the L.U., may be issued an honorary withdrawal card provided dues are paid for the previous month or the current month if the application is made after the 16th of such month.

Upon returning to the trade, or again becoming employed, and having complied with this article, he shall deposit his withdrawall card in the L.U. that issued it and continue membership by paying the current month dues. No new initiation fee is necessary, except that any "A," member shall pay the \$2 fee as required in Article X.

Sec. 4. "BA" members not employed under the jurisdiction of the local union, for at least a month can be shown as on honorary withdrawal without actual issuance of the card, unless the L.U. byluws provide otherwise. Officers of the L.U. are not entitied to withdrawal status without forfeiture of their

However a "BA" member, shown as on honorary withdrawal or on honorary withdrawal card not ex-

eeeding two months, may retain his continuous standing in the L.U., and eligibility for local union office and as delegate to the I.C., by paying dues for the months of unemployment before becoming in 'debted to his L.U. for three months' dues had he been employed.

Sec. 5. The validity of any withdrawal card shall be dependent upon the good conduct of the member. It can be annulled by any L.U. or by the I.P. for violation of the laws of the I.B.E.W., or the bysows and rules of any L.U., or for, working with or employing non-members of the I.B.E.W. to perform electrical work, or for any action of the holder detrimental to the interests of the I.B.E.W. Membership in the I.B.E.W. automatically terminated upon annulment of any withdrawal card.

A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with provisions of this Constitution.

# MISCONDUCT, OFFENSES AND PENALTIES

Sec. 1. Any member may be penalized for commiting any one or more of the following offenses:

ting any one or more of the following offenses:

(1) Resorting to the courts for redress of any injustice which he may believe has been done him by the I.B.E.W. or any of its L.U.'s without first making use, for at least a four-month period, of the process aswillable to him under the I.B.E.W. Constitution including any appeal or appeals from any deciation against him.

(2) Urging or advocating that a member, or any L.U., start action in a court of law against the

I.B.E.W., or any of its officers, or against a L.U. or any of its officers, without first exhausting all remelies through all the courts of the I.B.E.W.

tion and the rules herein, or the bylaws, working (3) Violation of any provision of this Constituagreements, or rules of a L.U.

(4) Having knowledge of the violation of any provision of this Constitution, or the bylaws or rules of a L.U., yet failing to file charges against the offender or to notify the proper officers of the

(5) Obtaining membership through fraudulent means or by misrepresentation, either on the part of the member himself or others interested.

withdrawal from the I.B.E.W. of any L.U. or of any member or group of members. (6) Advocating or attempting to bring about a

(7) Publishing or circulating among the membership, or among L.U.'s, false reports or misrepresentation.

which misrepresent a L.U., its officers or repre-sentatives, or officers or representatives of the otherwise, or making oral statements, to public (8) Sending letters or statements, anonymous or officials or others which contain untruths about, or I.B.E.W.

(9) Creating or attempting to create dissatisfaction or diszension among any of the members or among L.U.'s of the I.B.E.W.

(10) Working in the interest of any organization or cause which is detrimental to, or opposed to, the (11) Slandering or otherwise wronging a member (12) Entering or being present at any meeting of of the I.B.E.W. by any wilful act or ucts.

meeting, while intoxicated, or drinking intoxicants in or near any such meeting, or carrying intoxicants a L.U., or its Executive Board, or any committee into such meeting.

using abusive language, creating or participating in any disturbance, drinking intoxicants, or being in-toxicated, in or around the office or headquarters of (13) Disturbing the peace or harmony of any L.U. meeting or meeting of its Executive Board,

(14) Making known the business of a L.U. to perions not entitled to such knowledge.

(15) Fraudulently receiving or missppropriating any moneys of a L.U. or the I.B.E.W.

(16) Attending or participation in any gathering or meeting whatsoever for the purpose of advocating dual unionism, secession, schism, unauthorized york stoppages or strikes or other violation of the aws and rules of the I.B.E.W. or its L.U.'s.

party in any way to such act in an effort to induce members to vote for or against any candidate or (It shall not be considered an offense when a L.U. (17) Mailing, handing out, or positing cards, handbills, letters, marked ballots, or displaying candidates for L.U. office, or candidates to convenstreamers, banners, signs or anything else of a vicious, fraudulent, or libelous nature, or being a tions.

ings of any kind-except that the word "SAMPLE" shall appear prominently across the face of the ballot. The sample shall otherwise be an exact duplirate of the official ballot to be used.)

mails out-or posts in a conspicuous place-a sem-

ple of the official hallot to be used in any LU. election. However, the sample shall not carry any mark-

to the sample ballot, a L.U. may distribute an oricial publication which shall list all candidates for I.T. office, together with a factual record of activi-(A) Notwithstanding the above, and in addition ies within the L.U., committee assignments perbruned, offices held and experience gained for and in luchaif of the L.U. This publication shall be prepared under the supervision of the duly designated L.U. Election Committee.

(B) The distribution of this official L.U. publication, properly prepared as set forth above, shall not be in violation of Article XVIII, Section 20.

sentative of any L.U., or other organization coming under the I.B.E.W.'s jurisdiction, shall be held lia-He for allowing individuals or agencies to solicit. grams, etc., when the name of a L.U. or the I.B.E.W., or the names or pictures of L.U. or Internutional officers appear in such matter without consuch advertising without consent of the I.P. or for sent of the I.P. Any member, any officer or repre-Soliciting advertising for yearbooks, in any way violuting this provision.

workmanlike manner, or leaving work in a condition that may endanger the lives or property of others, or proving unable or unfit mentally, to learn proper-(19) Failure to install or do his work in a safe,

(20) Causing a stoppage of work because of any alleged grievance or dispute without having consent of the L.U. or its proper officers.

ly his trude.

(21) Working for any individual or company declared in difficulty with a L.U. or the I.B.E.W., in . . . accordance with this Constitution. .

(22) Wilfully committing frand in connection. with obtaining or furnishing credentials for dele-

(23) Allowing another person to use, or altering gutes to the I.C. or being connected with any fraud in voting during the I.C. n any manner.

his membership card, receipt, or other evidence of membership in the I.B.E.W.

Any member convicted of any one or more of the above-named offenses may be assessed or suspended, or both, or expelled.

above, the member may be assessed an amount equal to the reasonable attorneys' fees and costs incurred by the I.B.E.W. or L.U. as a result of said violation In case of conviction of violation of subsection (1) in addition to, or in lieu of, any other penalty.

If an officer or representative of a L.U., is convicted of any one or more of the above-named offenses, he may be removed from office or position, or assessed or suspended, or both, or expelled.

an amount equal to the reasonable attorneys' fees sult of said violation in addition to, or in lieu of, any above, the officer or representative may be assessed and costs incurred by the I.B.E.W. or I.U. as a re-In case of conviction of violation of subsection (1) other penalty.

. Every member, officer, Local Union, Railroad Council. System Council or other subordinate body shall be obliged to exhaust all remedies provided for in this Constitution, including all available appeals, before starting an action in a court of law against the I.B.E.W., L.U. or other subordinate body.

The initials "L.U.'s," as used throughout this article, shall include Railroad Councils, System Councils and other subordinate bodies where applicable.

### Charges and Trials

Sec. 2. All charges, except against officers and representatives of L.U.'s, shall be heard and tried by the L.U. Executive Board which shall act as the trial board, in accordance with Article XIX. A majority woo of the board shall be sufficient for decision and sentence.

Ĝ

(This section shall not be construed to conflict with power of the I.P. or the I.E.C. to take action in certain cases, as provided in Articles IV, and IX.)

Sec. 3. All charges against a member or members must be presented in writing, signed by the charge ing party, and specify the section or sections of this Constitution, the bylaws, rules, or working agreement allegedly violated. The charges must state the act or acts considered to be in violation, including approximate relevant dates or places.

Sec. 4. Charges against members must be submitted to the R.S. of the L.V. in whose jurisdiction the alloged act or acts took place within 30 days of the time the charging party first became aware, or reasonably should have been aware, of the alloged act or acts. The charges shall be read but not discussed at the next regular meeting of the L.U., following the filing of the charges. The R.S. shall immediately send a copy of such charges to the accused member at his last known address together with written notice of the time and place he shall appear before the trial board.

For the trial board shall-proceed with the case not later than 45 days from the date the charges were filed. The board shall grant a reasonable delay to the accused when it feels the faces or circumstances warrant such a delay. The accused shall be granted a fair or impartial trial. He must, upon request, be allowed an I.B.E.W. member to represent him.

Sec. 6. When the trial hoard has reached a deci-

any, to the next regular meeting of the L.U. Such report or action of the board shall not be discussed for acted upon by the L.U. The action of the trial board shall be considered the action of the L.U., and the report of the board shall conclude the case, or cases, except for the accused having the right of appeal to the I.V.P., then to the I.P., then to the I.E. cand then to the I.C. Rowever, the board may reopen and reconsider any case or cases when it feels the facts or circumstances justify doing so, and it shall do so when directed by the I.V.P. or I.P.

Sec, 7. If the accused wilfully fails to stand trial

or attempts to evade trial—the trial board shall,
proceed to hear and determine the case just as
though the acqused were present.

# Trials of Officers and Representatives

Sec. 8. All charges against an officer or representative of a L.U. must be presented in writing, signed by the charging party, and specify the section or sections of this Constitution, the bylawa, rules or working agreement violated. The charges must state the act or acts considered to be in violation, including approximate relevant dates and places; and must be made within 30 days of the time the charging party first became aware, or reasonably should have been aware, of the alleged act or acts.

Such charges must be filed with the I.V.P. in whose district the I.V. is located where the alleged act or sets took place, or as directed by the I.P. should more than one district be involved. However, if such charges are against an officer or representative of a railroad I.V., or an officer, general chairman or representative of a Railroad I.V.

these shall be filed with the LV.P. in charge of rail-

(This section shall not be construed to conflict with power of the I.P. or the I.E.C. to take action in certain cases, as provided in Articles IV and IX.)

Sec. 9. The I.V.P. shall pass upon and determine such case or cases, with the accused having the right of appeal to the I.P., then to the I.E.G., then to the I.C. Any such appeal, to be recognized, must be made within 30 days from the date of the decision asson appeared from No appeal from the I.V.P. shall suggest operation of any decision.

Sec. 10. The I.V.P. may require that all evidence, testimony, or statements be submitted to him in writing for review, decision and sentence (if any) or he may hear the case in person. If he so decides, he may appoint a referee, who may or may not be a member, to take testimony and report to him.

Sec. 11. The I.V.P. may reopen any case or cases when there is new evidence or testimony, facts or circumstances, which he feels are sufficient to justify such being done.

### Appeals

Sec. 12. Any member who claims an injustice has been done him by any L.U. or trial board, or by any Eulircal Council, may appeal to the L.V.P. any time within 45 days after the date of the action complained of. If the appeal is from an action of a railroad local union, or a Railroad Council, it must go to the LV.P. in charge of railroad matters.

A copy of any appeal must be filed with the L.U., or with the Railroad Council, as the case may be. Sec. 13. No appeal for revocation of an assess-

paid the assessment, which he can do under protect. When the assessment exceeds \$25, payments of not less than \$20 it monthly installments must be made. The first monthly installment must be made within monthly installment continued thereafter or the appeal will not be considered.

Sec. 14. When a decision has been rendered by the N.P. it shall become effective immediately.

Sec. 15. No appeals from decisions of the LVP, or from the LE, or from the LE, or shall be recognized unless the party or parties appealing have compiled with the decision from which they have appealed. However, this section may be waived by the party making the decision if good and sufficient reasons are furnished and he is requested to do so.

Sec. 16. Appeals to the I.P. and to the I.E.C., and to the convention, to be considered, must be made within 30 days from the date of the decision appealed from. (Appeals to the I.E.C., and to convertions must be filed with the I.S.). If no appeal is made within 30 days from the date that any decision is rendered, such decision shall be considered final.

Sec. 17. Any member penalized or otherwise disciplined for an offense may appeal.

Sec. 18. When an appeal is taken above the LV.P., only the avidence submitted in the original: case of appeal shall be considered.

In cases where parties claim they have new and important evidence affecting a case in which decision has been rendered, they may submit this within 50 days to the authority who rendered the first decision, with a request that the case be reopened. Such authority shall decide whether the matter submitted justifies reopening the case.

ment shall be recognized unless the member has first

### SUPREME COURT OF THE UNITED STATES

No. 73-556

FLORIDA POWER & LIGHT CO., PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 and 1263, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 21, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 73-795 and a total of one hour is allotted for oral argument.

### SUPREME COURT OF THE UNITED STATES No. 73-795

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 21, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 73-556 and a total of one hour is allotted for oral argument.

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INTERNATIONAL EMPTEMBEROOD OF ELECTRICAL WORKSHA, LOCAL 641, 622, 759, 620 and 1264,

NATIONAL LABOR RELATIONS BOARD,

Respondente

No. 73-735

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### Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

V

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local 641, 622, 759, 820 and 1263,

and

NATIONAL LABOR RELATIONS BOARD, Respondents.

### No. 73-795

NATIONAL LABOR RELATIONS BOARD,

Petitioner.

V

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134, INTERNATIONAL BROTHER-HOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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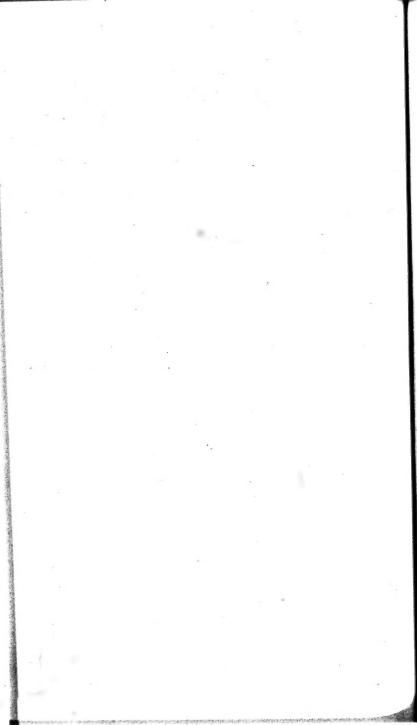
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### CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

### In the matter of: IBEW, AFL-CIO, and Local 134, etc.

### Case. No. 13-CB-2890

6.10.69

Charge filed

12.51.09	hearing, dated
1.13.70	Local 134's answer to complaint
1.14.70	IBEW's answer to complaint
3. 2.70	Amended charge filed
3.31.70	Hearing opened
4. 3.70	Hearing closed
6.29.70	Trial Examiner decision, dated
7.17.70	Bell Supervisors' exceptions to Trial Examiner's decision, received
8. 5.70	IBEW's motion to permit oral argument before the Board, received
8. 5.70	IBEW's exceptions to Trial Examiner's decision, received
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7.14.71	Decision and Order issued by the National Labor Relations Board
9.22.72	Panel decision of the Court of Appeals
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1 91 74	Order of Supreme Court granting certioneri

Form NLRB—508 (2-60) Form Approved Budget Bureau No. 64-R003.11

G. C. Exh. 1(a)

### UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

### Case No. 13-CB-2890

Date Filed June 10, 1969

1. Labor Organization or Its Agents Against Which Charge Is Brought

Name: International Brotherhood of Electrical Workers, AFL-CIO

1200 15th St. N.W., Washington, D.C. (City, State and ZIP Code) Local 134, International Brotherhood of Electrical Workers 600 W. Washington Blvd., Chicago, Ill. 60606

2. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) Subsection(s) 8(b)(1)(B) of the National Labor Relations Act, and these unfair labor practice are unfair labor practices affecting commerce within the meaning of the Act.

The organizations since the Summer of 1968 have been and are restraining and coercing Illinois Bell Telephone

Company in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by levying fines in large amounts of money against sundry of such representatives, supervisors within the meaning of the Act, because they worked during a strike conducted by Local 134 against the employer during the Summer and Fall of 1968. Among the representatives so fined and the amounts of their fines are the following: H. W. Anderson, R. A. Hawkins, Jr., D. L. MacLennan, J. A. Marqua and W. H. Schroeder, \$1,000 each; G. O. Balling, D. E. Bennish, R. Bing, R. Bowes, J. J. Braakman, J. R. Cline, H. E. Drucker, L. Farrell, S. J. Finlay, Jr., B. Frueh, R. Goodrich, F. C. Hagen, R. A. Hawkins, Sr., E. Hedstrom, R. L. Holm, J. P. Howe, N. G. Jacobsen Jr., R. O. Johnson, R. H. Kech, K. C. Klopfleisch, C. H. Kopeika, W. L. Krizenecky, J. T. Magnuson, P. S. McCloskey, K. G. Mcguire, J. E. Moore, R. H. Muench, R. P. Murphy, C. W. Paulson, I. I. Plahm, G. E. Roth, G. F. Schaefer, C. Schmidt, R. A. Schulz, N. Skertich, R. E. Thome, G. Waters, R. J. Wenseritt and C. S. Willoughby, \$500 each, or a grand total for the foregoing named supervisors of \$24,500. fines were imposed by the Local Union on various dates during October and November, 1968 and were timely appealed under the Union's Constitution to the International Vice President at sundry dates during October, November and December, 1968. The appeals were denied by the International Vice President at sundry dates during January and February, 1969. Thereafter the various affected representatives appealed to the International President, who on or about May 28, 1969, denied one of the appeals, that of Robert P. Murphy, and in consistency will, if he has not already done so, deny all of the appeals. Immediate injunctive relief under Section 10(j) is requested.

3. Name of employer: Illinois Bell Telephone Com-

pany.

4. Location of plant involved (Street, City, State, and ZIP Code): 212 W. Washington St., Chicago, Ill. 60606.

5. Type of establishment (Factory, mine, wholesaler, etc.): Telephone company.

6. Identify principal product or service: Communication.

7. No. of workers employed: 2,500.

8. Full name of party filing charge: Bell Supervisors

Protective Association, not a labor organization.

9. Address of party filing charge (Street, City, State and ZIP Code): c/o G. B. Christensen, 38 S. Dearborn Street, Chicago, Ill. 60603.

10. Tel. No.: FI 5-3600.

### 11. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

> By /s/ George B. Christensen (Signature of representative or person making charge) Attorney

June 10, 1969

Wilfully false statement on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTEENTH REGION

Case No. 13-CB-2890

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

(ILLINOIS BELL TELEPHONE COMPANY)

and

BELL SUPERVISORS PROTECTIVE ASSOCIATION (Not a Labor Organization)

COMPLAINT AND NOTICE OF HEARING

It having been charged by Bell Supervisors Protective Association that International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as Respondent International), and Local 134, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as Respondent Local 134), have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seg. (hereinafter called the Act), the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (hereinafter called the Board), by the undersigned Acting Regional Director for the Thirteenth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

Ι

The charge herein was filed on June 10, 1969, and a copy thereof was served on Respondent Local 134 by registered mail on or about June 12, 1969, and on Re-

spondent International by registered mail on or about June 13, 1969.

### II

(a) Illinois Bell Telephone Company (hereinafter referred to as the Employer) is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Illinois.

(b) At all times material herein, the Employer has maintained its principal office and place of business at 225 West Randolph Street, Chicago, Illinois, and branch offices and places of business in the States of Illinois and Indiana.

(c) The Employer is engaged in the business of providing local and long-distance communications and related services as part of a nationwide telephone system.

(d) During the past calendar year, the Employer, in the course and conduct of its business operations, derived gross revenue in excess of one million dollars for communication services between points within the States of Illinois and Indiana, and points in other States.

(e) During the past calendar year, the Employer, in the course and conduct of its business operations, had a gross volume of business in excess of one million dollars.

### III

The Employer is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### IV

- (a) Respondent International is, and has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.
- (b) Respondent Local 134 is, and has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.

### V

(a) At all times material herein, there is, and has been, a collective-bargaining agreement between Respondent Local 134 and the Employer.

(b) The aforementioned Agreement was entered into in 1948 and was last amended June 30, 1968, to be ef-

fective through June 26, 1971.

(c) Under the Agreement referred to in subparagraphs (a) and (b) referred to above, Respondent Local 134 is the exclusive representative of employees described in Article II, Section 1 (A), of said collective-bargaining

agreement.

- (d) The persons employed by the Employer in the classifications set forth below are members of Respondent Local 134 under the terms of the collective-bargaining agreement referred to above in subparagraphs (a), (b) and (c), or because they voluntarily have become members of Respondent Local 134.
  - (1) District Installation Superintendent
  - (2) Plant Assignment Foreman
  - (3) PBX Installation Foreman
  - (4) Assistant Staff Supervisor
  - (5) General Foreman
  - (6) Building Cable Foreman
  - (7) Test Center Foreman
  - (8) Engineer

### VI

(a) Including among the duties of persons occupying the classifications set out in paragraph V (d) above are:

The authority to adjust grievances in the interest of the employer; and

Supervisory authority in the day-to-day contact with employees of the Employer involved herein.

(b) In addition, persons occupying the classifications set out in paragraph V (d) above are, because of their

supervisory positions, persons upon whom the Employer has called, and/or is likely to call, as representatives of the Employer for the purpose of adjusting grievances and/or, as representatives in collective-bargaining negotiations.

(c) At all times material herein, the persons employed by the Employer, occupying the classifications set out in paragraph V (d) above, have been, and are, supervisors and agents of the Employer within the meaning of Sections 2(11) and 2(13) of the Act, or are managerial employees.

### VII

(a) On May 8, 1969, Respondent Local 134, as a member of System Council T-4, struck the Employer.

(b) The strike continued until September 20, 1968.

(c) During the strike, persons in classifications referred to in paragraph V (d) above worked and/or supervised the performance of work on behalf of the Employer.

(d) Following the conclusion of the strike, Respondent Local 134 investigated, pressed charges against and imposed fines on the individuals named in Appendix "A"

attached hereto.

(e) The individuals named in said Appendix "A" were fined by Respondent Local 134 because they worked and/or supervised the performance of work on behalf of the Employer during the aforementioned strike.

(f) In addition, the persons named in Appendix "B" attached hereto were fined by Respondent Local 134 because of their leadership in, and/or participation in,

the Bell Supervisors Protective Association.

(g) Said Association, referred to in paragraph (f) above, was formed during the aforementioned strike to promote the interest of the Employer's supervisors, including those persons in the classifications named in paragraph V (d) above.

### VIII

(a) The Constitution of Respondent International, in Article XXVII titled "Misconduct, Offenses and Penal-

ties," under the subheading titled "Appeals," provides, in Sections 12, 14, 15, and 16, as follows:

Sec. 12. Any member who claims an injustice has been done him by any L.U. [Local Union] or trial board, or by any Railroad Council, may appeal to the I.V.P. [International Vice-President] any time within 45 days after the date of the action complained of. If the appeal is from an action of a railroad local union, or a Railroad Council, it must go to the I.V.P. in charge of railroad matters.

A copy of any appeal must be filed with the L.U., or with the Railroad Council, as the case may be.

Sec. 14. When a decision has been rendered by the I.V.P. it shall become effective immediately.

Sec. 15. No appeals from decisions of the I.V.P., or from the I.P., or from the I.E.C. [International Executive Committee], shall be recognized unless the party or parties appealing have complied with the decision from which they have appealed. However, this section may be waived by the party making the decision if good and sufficient reasons are furnished and he is requested to do so.

Sec. 16. Appeals to the I.P. and to the I.E.C., and to the convention, to be considered, must be made within 30 days from the date of the decision appealed from. (Appeals to the I.E.C. and to conventions must be filed with the I.S.) If no appeal is made within 30 days from the date that any decision is rendered, such decision shall be considered final.

- (b) Subsequent to the imposition of fines referred to in subparagraph (a) above, the individuals named in Appendix "A", pursuant to Respondent International's Constitution, Article XXVII, Section 12, as stated in subparagraph (a) above, appealed the imposition of said fines by Respondent Local 134 to a Vice-President of Respondent International.
- (c) In or about January and/or February 1969, a Vice-President of Respondent International affirmed Re-

spondent Local 134's decision to impose the fines on in-

dividuals named in Appendix "A."

(d) Pursuant to Respondent International's Constitution, Article XXVII, Section 16, in subparagraph (a) above, the individuals named in Appendix "A" appealed the decisions of a Vice-President of Respondent International, upholding the fines imposed by Respondent Local 134.

(e) In or about late May and/or early August 1969, the President of Respondent International affirmed the decisions of a Vice-President to uphold the fines imposed on the individuals named in Appendix "A" by Respondent Local 134 and dismissed the aforesaid appeals.

### IX

In or about October 1969, and continuing to date, Respondent Local 134, through their officers and agents, have attempted to collect, and have, in fact, collected said fines imposed on persons named in Appendix "A."

### X

The conduct of Respondent Local 134 as described in paragraph VII, subparagraphs (d), (e) and (f), and paragraph IX above, has the foreseeable effect to bring, or is bringing pressure upon the individuals employed in the classifications set forth in paragraph V (d) above—those fined and those not fined—to force them to place their allegiance to Respondent Local 134 above their allegiance to the Employer, whenever those respective interests might conflict.

### XI

By the conduct referred to in paragraph VII, subparagraphs (d), (e) and (f), and paragraph IX above, Respondent Local 134 impinged, and is impinging on the Employer's statutory rights to select its representatives for collective bargaining and grievance adjustments, and to rely upon the uncontested allegiance of the selected representatives, by causing the Employer to reasonably believe that their grievance adjustors and collective-bar-

gaining representatives will place their allegiance to Respondent Local 134 above their allegiance to the Employer, whenever those respective interests might conflict.

#### XII

The conduct of Respondent Local 134 described in paragraph VII, subparagraphs (d), (e) and (f), and paragraph IX above, constitutes restraint and coercion of the Employer in the selection of its representatives within the meaning of Section 8(b) (1) (B) of the Act, and, by such conduct, Respondent Local 134 has violated, and is violating, Section 8(b) (1) (B) of the Act.

#### XIII

- (a) Respondent International, by sustaining the decision and discipline of Respondent Local 134, and dismissing the appeals as aforesaid, sanctioned the conduct of Local 134 and the foreseeable effect of such conduct as described in paragraph VII, subparagraphs (d), (e) and (f), and paragraphs IX and X above.
- (b) In or about October 1969, and continuing to date, Respondent International, through their officers and agents, have attempted to collect, and have, in fact, collected said fines imposed on persons named in Appendix "A."

#### XIV

- (a) By its conduct described in paragraph XIII above, Respondent International thereby is impinging on the Employer's statutory rights to select its representatives for collective bargaining and grievance adjustments, and to rely upon the uncontested allegiance of selected representatives.
- (b) Respondent International thereby continued, and is continuing, the restraint and coercion of the Employer in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

#### xv

By its conduct described in paragraph VIII, subparagraphs (c) and (e), and paragraphs XIII and XIV, Respondent International has violated, and is violating, Section 8(b)(1)(B) of the Act.

#### XVI

The acts of Respondents Local 134 and International described above in paragraphs VII through XV, occurring in connection with the operations of the Employer described in paragraph II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 9th day of February, 1970, at 10 a.m., in Room 824-A, United States Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Attached is Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held before the National Labor Relations Board in Unfair Labor Practice Cases As Taken from the Board's Published Rules and Regulations and Statements of Procedure.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondents Local 134 and International shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an Answer to said Complaint within ten days from the date of service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to

be admitted to be true and may be so found by the Board.

DATED at Chicago, Illinois, this 31st day of December, 1969.

/s/ Martin H. Schneid
MARTIN H. SCHNEID
Acting Regional Director
National Labor Relations Board
Thirteenth Region
Room 881, United States Courthouse and Federal Office
Building
219 South Dearborn Street
Chicago, Illinois 60604

Attachments

#### APPENDIX "A"

Name		Title When Fined
G. O. Balling	_	District Installation Supt.
C. H. Barnes		Plant Assignment Foreman
D. Bennish		PBX Installation Foreman
R. B. Bing	_	PBX Installation Foreman
R. J. Bowes	-	PBX Installation Foreman
J. Braakman	_	Assistant Staff Supervisor
J. Cline	_	PBX Installation Foreman
F. Crowley	_	Assistant Staff Supervisor
H. E. Drucker	-	PBX Installation Foreman
A. Ehrhardt	_	Engineer
L. F. Farrell	-	Test Center Foreman
S. Finlay	_	PBX Installation Foreman
B. Frueh	-	PBX Installation Foreman
B. J. Gacek	_	PBX Installation Foreman
R. Goodrich	_	PBX Installation Foreman
F. Hagen	-	PBX Installation Foreman
E. Hedstrom	_	Building Cable Foreman
R. Holm	_	PBX Installation Foreman
J. Howe	_	PBX Installation Foreman
N. G. Jacobson	_	PBX Installation Foreman
R. O. Johnson		PBX Installation Foreman
R. H. Kech	_	Building Cable Foreman
T. Keegan	-2	Engineer
K. C. Klopfleisch	-	PBX Installation Foreman
C. Kopieka	_	PBX Installation Foreman
W. Krizenecky	_	PBX Installation Foreman
V. Lovell		PBX Installation Foreman
J. T. Magnuson	_	Plant Assignment Foreman

Name		Title When Fined
P. S. McCloskey	_	PBX Installation Foreman
K. McGuire	_	Assistant Staff Supervisor
J. Moore	_	PBX Installation Foreman
R. H. Muench		PBX Installation Foreman
R. P. Murphy		PBX Installation Foreman
A. Novello	_	<b>Building Cable Foreman</b>
C. W. Paulson	_	PBX Installation Foreman
I. W. Plahm	_	PBX Installation Foreman
G. E. Roth	-	PBX Installation Foreman
G. Schaeffer	_	PBX Installation Foreman
C. R. Schmidt		PBX Installation Foreman
J. Schraag	_	PBX Installation Foreman
R. A. Schulz	_	PBX Installation Foreman
N. Skertich	_	PBX Installation Foreman
M. R. Tagney	_	PBX Installation Foreman
R. Thome	_	PBX Installation Foreman
G. M. Waters	-	PBX Installation Foreman
R. J. Wenserett		PBX Installation Foreman
W. S. Wheeler		PBX Installation Foreman
D. L. MacLennan	_	General Foreman
C. S. Willoughby	_	District Installation Supt.
H. W. Anderson	_	PBX Installation Foreman
R. A. Hawkins	-	PBX Installation Foreman
J. Marqua	_	PBX Installation Foreman
W. Schroeder	_	PBX Installation Foreman

#### APPENDIX "B"

Name		Title When Fined
D. L. MacLennan	_	General Foreman
H. W. Anderson	_	PBX Installation Foreman
R. A. Hawkins	_	PBX Installation Foreman
J. Marqua	_	PBX Installation Foreman
W. Schroeder	_	PBX Installation Foreman

Form NLRB-4668 (9-67)

(C CASES)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEAR-INGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE CASES AS TAKEN FROM THE BOARD'S PUBLISHED RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in

Washington, D.C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Trial Examiner, upon the joint request of the parties, will conduct a "pre-hearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record-for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Trial Examiner conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an enoutromarry the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Ex-

aminer and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire

line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the partimes and the fratural issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed

findings and conclusions, or both, with the Trial Exam-

iner who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D. C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. All briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's

official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 102.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest.

#### G. C. EXH. 1(e)

## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTEENTH REGION

Case No. 13-CB-2890

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

(ILLINOIS BELL TELEPHONE COMPANY)

and

BELL SUPERVISORS PROTECTIVE ASSOCIATION (Not a Labor Organization)

#### ANSWER OF LOCAL 134 TO COMPLAINT

Now comes LOCAL 134, INTERNATIONAL BROTH-ERHOOD OF ELECTRICAL WORKERS, AFL-CIO (hereinafter called Local Union), by its attorneys, ROB-ERT E. FITZGERALD, JR., and EDWARD J. CALI-HAN, JR., and answers the Complaint in the above captioned case as follows:

A) The Local Union admits the allegations contained in paragraphs I, II (a) (b) (c) (d) and (e), III, IV (a)

and (b), VII (a) and (b), and VIII (a).

B) The Local Union denies each and every allegation contained in paragraphs V (a) (b) (c) and (d), VI (a) (b) and (c), VII (c) (d) (e) (f) and (g), VIII (b) (c) (d) and (e), IX, X, XI, XII, XIII (a) and (b), XIV (a) and (b), XV and XVI.

C) The Local Union affirmatively states as follows:

1. That the charging party, the so-called Bell Supervisors Protective Association, is a company dominated labor organization, which was formed by the Illinois

Bell Telephone Company, during the strike referred to in paragraph VII (a) and (b), for the purpose of soliciting members of the Local Union to voluntarily act as strike breakers, by performing the craft work of their

fellow members who were on strike.

2. That most of the persons listed in Exhibit A of the Complaint voluntarily acted as strike breakers by performing the craft work of their fellow members who were on strike, and that the Local Union fined most of the persons listed in Exhibit A for engaging in that conduct.

3. That the Local Union fined the persons listed in Exhibit B for their conduct in assisting the Illinois Bell Telephone Company in the formation and operation of the company dominated labor organization referred to in 1 above.

4. That all of the conduct of the Local Union was within the proviso of Section 8(b)(1) of the Act.

WHEREFORE, the Local Union prays that the Complaint herein be dismissed.

- /s/ Robert E. Fitzgerald, Jr. ROBERT E. FITZGERALD, JR.
- /s/ Edward J. Calihan, Jr. EDWARD J. CALIHAN, JR.

Attorneys for Local 134. International Brotherhood of Electrical Workers. AFL-CIO

53 West Jackson Blvd. Chicago, Illinois 60604 922-3113

#### CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer have been mailed this 13th day of January, 1970, via regular mail to:

Ross M. Madden, Regional Director National Labor Relations Board Thirteenth Region Room 881, United States Courthouse 219 South Dearborn Street Chicago, Illinois 60604

George B. Christensen, Esq. Winston, Strawn, Smith & Patterson 38 South Dearborn Street Chicago, Illinois 60603

International Brotherhood of Electrical Workers, AFL-CIO Attn: Laurence J. Cohen, Esq. 1200 - 15th Street, N.W. Washington, D.C. 20005

Local 134, International Brotherhood of Electrical Workers, AFL-CIO, 600 West Washington Boulevard Chicago, Illinois 60606

Bell Supervisors Protective Association c/o George B. Christensen, Esq. Winston, Strawn, Smith & Patterson 38 South Dearborn Street Chicago, Illinois 60603

> /s/ Robert E. Fitzgerald, Jr. ROBERT E. FITZGERALD, JR.

(6)

#### G. C. EXH. 1(f)

#### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTEENTH REGION

Case No. 13-CB-2890

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

(ILLINOIS BELL TELEPHONE COMPANY)

and

BELL SUPERVISORS PROTECTIVE ASSOCIATION

ANSWER OF RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

The International Brotherhood of Electrical Workers, AFL-CIO (hereinafter Respondent International), herewith files this Answer to the allegations in the Complaint and Notice of Hearing issued by the Acting Regional Director for Region 13 on December 31, 1969.

Respondent International admits the allegations of the Complaint contained in paragraphs I, II(a)-(e), III,

IV(a)-(b), VII(a)-(b) and VIII(a).

Respondent International denies the allegations of the Complaint contained in paragraphs V(a)-(d), VI(a)-(e), VII(e)-(g), VIII(b)-(e), IX, X, XI, XII, XIII(a)-(b), XIV(a)-(b), XV and XVI.

In addition to the denial of the paragraphs of the Complaint set forth above, Respondent International sets

forth as affirmative defenses the following:

1. Assuming, arguendo, the truth of all the factual allegations in the Complaint, the conduct described therein does not violate Section 8(b)(1)(B) of the Act as a matter of law.

2. Respondent International did not, in fact or in law, fine or otherwise discipline any of the individuals listed in Appendices A or B to the Complaint, nor was Respondent Local 134 acting for or on behalf of the International with respect to any actions it took against said individuals. Therefore, assuming, arguendo, that Respondent Local 134 is found to have violated Section 8(b) (1) (B) as alleged in the Complaint, Respondent International committed no act itself which constitutes a violation of Section 8(b) (1) (B); nor can any violation of that Section be found based on its status as the parent organization of Respondent Local 134.

Respectfully submitted,

/s/ Laurence J. Cohen
Laurence J. Cohen
SHERMAN, DUNN & COHEN
1200 - 15th Street, N.W.
Washington, D. C. 20005

Counsel for Respondent International

#### CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer were mailed this 14th day of January 1970 to the following:

Robert E. Fitzgerald, Jr., Esquire 53 West Jackson Boulevard, Suite 1112 Chicago, Illinois 60604 George B. Christensen, Esquire 38 South Dearborn Street Chicago, Illinois 60603

#### G. C. Exh. 1(i)

Form NLRB-508 (2-60)

Form Approved Budget Bureau No. 64-R003.11

#### DOCKETED

#### UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space Case No. 13-CB-2890

Date Filed March 2, 1970

1. Labor Organization or Its Agents Against Which Charge Is Brought

Name

International Brotherhood of Electrical Workers, AFL-CIO1200 15th St. N.W., Washington, D.C.

Address (Street, City, State and Zip Code)
Local 134, International Brotherhood of Electrical Workers
600 W. Washington Blvd., Chicago, Ill. 60606

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b) subsection(s) 8(b) (1) (B) of the National Labor Relations

Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The organizations since the Summer of 1968 have been and are restraining and coercing Illinois Bell Telephone Company in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by levying fines in large amounts of money against sundry of such representatives, supervisors within the meaning of the Act, because they worked during a strike conducted by Local 134 against the employer during the Summer and Fall of 1968. Among the representatives so fined and the amounts of their fines are the following: H. W. Anderson, R. A. Hawkins, Jr., D. L. MacLennan, J. A. Marqua and W. H. Schroeder, \$1,000 each; G. O. Balling, D. E. Bennish, R. Bing, R. Bowes, J. J. Braakman, J. R. Cline, H. E. Drucker. L. Farrell, S. J. Finlay, Jr., B. Frueh, R. Goodrich, F. C. Hagen, R. A. Hawkins, Sr., E. Hedstrom, R. L. Holm, J. P. Howe, N. G. Jacobsen Jr., R. O. Johnson, R. H. Kech, K. C. Klopfleisch, C. H. Kopeika, W. L. Krizonecky, J. T. Magnuson, P. S. Mc-Closkey, K. G. Mcguire, J. E. Moore, R. H. Muench, R. P. Murphy, C. W. Paulson, I. I. Plahm, G. E. Roth, G. F. Schaefer, C. Schmidt, R. A. Schulz, N. Skertich, R. E. Thome, G. Waters, R. J. Wenseritt and C. S. Willoughby, \$500 each, or a grand total for the foregoing named supervisors of \$24,500. The fines were imposed by the Local Union on various dates during October and November, 1968 and were timely appealed under the Union's Constitution to the International Vice President at sundry dates during October, November and December, 1968. The appeals were denied by the International Vice President at sundry dates during January and February, 1969. Thereafter the various affected representatives appealed to the International President, who on or about May 28, 1969, denied one of the appeals. that of Robert P. Murphy, and in consistency will, if he has not already done so, deny all of the appeals. Immediate injunctive relief under Section 10 (j) is requested.

The charging party is informed and believes that \$500 fines were imposed by the Local Union at various dates during October and November, 1968 upon the following named representatives of Illinois Bell Telephone Company;

C. H. Barnes T. Keegan M. R. Pagney F. Crowley V. Lovell W. S. Wheeler A. Ehrhardt A. Novello R. A. Schultz B. J. Gacek J. Schraag J. Braakman

but is without information as to whether said fines were appealed.

- 3. Name of Employer
  Illinois Bell Telephone Company
- 4. Location of Plant Involved (Street, City, State, and ZIP Code)
  212 W. Washington St., Chicago, Ill. 60606
- 5. Type of Establishment (Factory, mine, wholesaler, etc.)

Telephone company

- 6. Identify Principal Product or Service Communication
- 7. No. of Workers Employed 2,500
- 8. Full Name of Party Filing Charge
  Bell Supervisors Protective Association, not a
  labor organization
- 9. Address of Party Filing Charge (Street, City, State and ZIP Code)

c/o G. B. Christensen One First National Plaza, Chicago, Illinois 60670

10. Tel. No. 786-5600

#### 11. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ George B. Christensen
(Signature of representative
or person making charge)
December 29, 1969
(Date)

Attorney
(Title or office, if any)

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

#### G. C. EXH. 4

As a result of a series of discussions held with representatives of Local 134 I.B.E.W. for the purpose of formulating a plan for merging Local 134 Supervisory forces into the 3 level structure required by the "District Unit" plan of operation the following conclusions have been reached:

#### PROMOTIONS

I All present P.B.X. General Foremen will be promoted to District Installation Superintendents reporting to the District Plant Superintendent in the Plant District to which they are assigned.

All present Building Cable General Foremen will be promoted to District Construction Supervisors reporting to the Division Construction Superintendent to whom they are assigned.

(A) As District Installation Superintendents and District Construction Supervisors their wages and conditions of employment will not be a matter of union-management negotiations but They will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and insurance benefits as a result of their membership in the union. However, any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personnel.

#### GENERAL FOREMEN

II The number of General Foremen under the contract will be restricted to one in each plant Division in the Chicago Area where Local 134 forces are employed under the contract and one in the State Area Plant Department where Local 134 forces are employed.

(A)

sion Supt. or the General Plant staff and their duties shall be as follows:
Supervision of all apprentices, Journeymen and Foremen in the Division to which they are assigned with respect to matters of personnel and employee relations such as: training, force adjustments, health and welfare, job safety,

They shall be assigned to the staff of the Divi-

overtime distribution, absenteeism, contract interpretation, etc., by coordinating these matters between the Division staff and the line organization. They may be assigned to qualify job observations and other assignments not inconsistent with the provisions of the contract.

It is understood that the Foremen, while reporting directly to the District Installation Superintendent or District Construction Supervisor as the case may be, may consult with the General Foreman of the Division in all cases where the proper application of these matters is in question.

(B) It is understood that future District Installation Superintendents or District Construction Supervisors will be chosen at the discretion of management and not necessarily from the ranks of General Foremen.

However, it is further understood that no discrimination will be shown, that individual ability and qualifications will control.

(C) Conditions may warrant regrading of a General Foreman to the status of Foreman but the company will use every effort to maintain qualified General Foremen in that assignment.

#### FOREMEN-

III All apprentices and journeymen employees who are members of Local 134 will be directly supervised by Foremen who are active members of Local 134, and nothing in these articles is meant to infer otherwise.

Tentative effective date July 1, 1954.

#### Approved:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS—LOCAL NO. 134

/s/ Harry J. Hughes For Local Union No. 134

/s/ J. M. Boyle Vice-President—Sixth District International Brotherhood of Electrical Workers

#### Approved:

ILLINOIS BELL TELEPHONE COMPANY
/s/ [Illegible]
General Plant Manager
Chicago Area

/s/ D. L. Brown General Plant Manager—State Area

## AGREEMENT

This Agreement entered into the 8th day of August, 1946, as a membed from time to time therester, and hereby further amended this minth day of October, 1966 by and between the ILLINOIS BELL TELEPHONE COMPANY which may be hereinafter referred to as the "Company" and LOCAL UNIONS NO. 134, 165, 315, 336 and 399 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORK-ERS, affiliated with the American Peteration of Labor — Congress of Industrial Organizations which may be hereinafter referred to collectively as the "Union" and individually as "Local Union No......"

# WITNESSETH THAT

WHEREAS, the Company recognizes the Union as the exclusive bargaining agency for those groups of employees of the Company, respective. by, hereinafter specified; and

WHEREAS, the parties desire to establish standards of conditions of employment applicable to such groups of employment spelicable to such groups of employment respectively, and under which they simil work for the Company during the tenure of this Agreement, and desire to regulate employment relations between the partles for the purpose of securing harmonious cooperation and the settling by peaceful means of disputes that may arrise affecting the employer employee relationship:

NOW THEREFORE, in consideration of the mutual promises an agreement hereinto entered, the parties agree as follows:

## ARTICLE I

Section 1. The Company recognizes the Union as the exclusive bargaining agency for those employees of its Plant Department whose titles and Classifications are included in the Wage Group Schedules, marked Exhibit A and Exhibit B, attached to and made a part of this Agreement.

Section 2. The words "employee" and "igmployees" mean are mployee or employees of the
Company represented by the Union as herein
provided. Use of the masculine gender herein
shall be taken to include the feminine gender where
appropriate. The word "iparty", when used herefin, refers to the Union or the company, as appropriate, and the word "iparties", refers to the
Union and the Company. The word "classification", when used herein refers to classification
of work or classification of employee or em-

Section 3. There shall be two (2) types of employees, regular employees who are engaged without time limitation and "temporary" employees who are engaged for a specific project or a limited period, not to exceed (9) months.

### ARTICLE II

Scope of Unit -- Work Covered

Section 1.

(a) This agreement covers all those employecs in the Plant Department of the Company in

the group represented by Local Union No. 134, whose littes are included in Exhibit "Ar" which is attached hereto and hereby made a part hereof; and those employees in the Plant Department of the Company in the group represented by Local Unions No. 165, 315, 336 and 399, whose titles are included in Exhibit "B" likewise attached hereto and made a part hereof; and the work customarily performed hereunder by the respective groups of such employees.

(b) During the tenure of this agreement the Company may continue to contract out such of the above work as is now customarily contracted out. If such work to be contracted out will cause layoffs, or part-timing, or prevent the rebiring of employees with seniority standing, such contracting out of work will be reviewed by the Company with the Company is equipped to perform and what the employees represented by the Union are able and trained to perform.

Section 2. During the tenure of this agreement the jurisdiction of work covered in this agreement to be assigned the two employee groups as shown in Section 1 above will remain as in the past unless otherwise agreed between the Company and the Local Unions involved. Section 3. The Union undertakes to settle any dispute which may occur between the Local Unions with respect to the assignment of work. The Company will assign the work as so agreed between the Local Unions, provided that the agreement franched is not in conflict with the provisions of fishs agreement.

Section 4. It is further agreed that the following work is not covered in this agreement.

lowing work now performed by elevator operators, janitor-elevator operators and starters who are members of the Elevator Operators' and Starters' Union, Local No. 66, as per agreement between the said Operators' Union and the Com-

(b) Work now performed by painters and electricians who are members of the Painters-District Council and Local Union No. 134, respectively, as per agreement between each of the said tive Unions and the Company.

two Unions and the Company.

(9) Work now performed by stationary engineers who are members of the International Union of operating Engineers, Local No. 399, as per agreement between the said Union and the

(d) Work of the Long Lines Division of the

Computy.

(c) A reasonable number of Management em(c) A reasonable number of Management to ployees (not to exceed 60) may be assigned to station installation work (Monday through Friday, 8:00 A.M. to 5:00 P.M.) within the bargaining unit as part of a training program, and while so assigned abul no be affected by provisions in this afgreed abul to be affected by provisions in this agreed that this arrangement shall not result in garted that this arrangement shall not result in part-timing or layoffs of any regular employee working under this Agreement.

## ARTICLE III

# Union Security

Section 1. All employees with thirty days or more of employment with the Company, who are

represented by Local Union No. 134 shall become and remain members of Local Union No. 134 in good standing as, a condition of employment under this agreement after July 7, 1963.

Section 2. All employees with thirty days or more of employment with the Company who on November 30, 1949, were members or who thereafter become members of Local Unions 165, 315, 336 or 399 shall maintain their membership in the Union in good standing as a condition of employment under this Agreement after July 7, 1963.

Section 3. It is agreed that for the purpose of Sections 1 and 2 immediately preceding. (a) an end an employee shall be deemed to be a member in good standing so long as he pays or feaders to the Union an amount equal to the regularly recurring monthly Union dues for the regularly return of this Agreement and (b) employees suspended from membership in the Union because of failure to tender their Union dues shall upon written request of the Union, be discharged; Provided, however, that the Union's request for discharged; Provided, bowever, that the Union's request for discharged is received prior to the expiration date of this Agreement.

## . ARTICLE IV

Wage Rates and Certain Working Conditions.

Section 1. The wage rates and certain of the working conditions applicable to the employees represented by Local Union No. 134 shall be as shown in Exhibit "A," attached hereto and made a part hereof; and the wage rates and certain of

provisions of this Agreement, or should any other grievance or dispute appear, such matters shall be processed according to the procedure set forth in this ARTICLE.

- Step 1. The employee or his Steward shall first bring the grievance to his Foreman, or other first line Supervisor.
- other trist time supervisor.

  then be taken upwith the succeeding appropriate levels of supervision by the propriate levels of supervision by the Union representative and shall be placed with the appropriate Manager or someone designated by the Company to handle such matters, who shall meet with the Union representative within two (3) workling days after receipt of the grievance and render a decision within five (5) days after receipt of the grievance
  - Step 3. If not thus adjusted, an attempt will be made to settle at a meeting between members of the System Council T-4 which Council is composed of representatives of each of the Local Union parties to this Agreement (who may appoint from its members a sub-committee to handle the matter under consideration) who may he accompanied by the Fusiness Manager of such Local Union or Unions directly involved in such matters and representatives of and delegated by the Company for these such Local Union or Unions directly involved in such matters and representatives of and delegated by the Company for these
    - this purpose.

      Step 4. If not adjusted at this meeting, the Pressident of the 1.B.L.W. or someone delegated by him to represent him, will, at the request of asald union, be called in said in conjunction with representatives of bad.

# ARTICLE XXVII

Grievance and Conference Procedure . .

Section 1. Should differences arise between the Company and the Union regarding the interpretation or application of any of the terms or parties referred to in Step 3, attempt to settle the grievance.

Section 2. Any grivance with respect to the question of interpretation or application of the provisions of this Agreement which cannot be satisfactorily disposed of by the representatives of the Company and the Union in the manner here-inbefore provided, shall be submitted in writing, at the request of either party, to arbitration as provided for in Article XXVIII of this Agreement.

Section 3. No grievance shall be considered to the company or Union unless presented within 80 calendar days after the petton or cocurrence complained of last occurred, or within 180 days for the facts relevant thereto are a matter of Company and the cocurred company account.

pany record.

Section 4. After a grievance has been referred to the Company by the Union, no Company representative will allectus the matter with the employment or employees involved except in the presence of a Union representative who handled the original negotiations, or any other representative whom the Union may assign to the case.

Section 5. The Company recognizes the right of the Union to investigate the diramistances surcounding any grievance or accident, and agrees to cooperate with the Union in such investigations. Section 6. Subject to Nules and Regulations of Ee National Labor Relations. Board and such legistion as may apply, the Company agrees to permit employees representing the Union to conservation Management representatives without loss

of pay during scheduled working hours.
Section 7. The Company and the Union shall keep each other informed regarding the personnel who are authorized to represent them in hargain-

### EXHIBIT A

the second second was a second second

Wage Group Number 1

General Foreman

. Wage Group Number 3 P.B.X. Installation Foreman

RUPERVISION

Building Cable Foreman.

Foreman, fourneyman and apprentices represented by Local Union No. 134 will be under the supervision of a General Foreman, but this shall not prevent the Company in from making inspections of the work at any time or from specifying the manney. En which the work shall be done.

# WORKING CONDITIONS FOR GENERAL FOREMEN AND FOREMEN

. No appointment as General Foreman will be made for a period of less than five (5) days.

- B. General Foreman and Foremen shall be paid at their straight time basic rate of pay for authorized overtime work cocurring on either a normally scheduled workday or on other days. when in either case such overtime equals or exceeds one-half of their normal daily assignment, provided, that it is not considered feasihle to grant an equivalent amount of time off with pay within a reasonable period.
- G. No pay deduction will be made for absence on a holiday, incidental sickness absence, or ressonable absence for other causes.

## EXHIBIT A

# Wage Group Number 3

Building Cable Splicer **3utilding Cableman** P.B.X. Installer lourneyman .

\* \$159.50

per week.

# Wage Group Number 4

P.B.X. Installation Apprentice Building Cable Apprentice

92.00 90.00 97.00 109.00 03.50 115.00 123.50 Second four months of service-2nd year Third four mouths of service-2nd year Second six months of service-1st year irst four months of service-2nd year Second six months of service-3rd year Second six months of service—4th year First six months of service-3rd year First six months of service-lst year First six months of service-4th year

man's examination before the Examining Board The wage rate of an apprentice having served his fourth year and who falls to pass a journeyof the Union will be paid \$127.50 per week until he passes a journeyman's examination.

\*Effective October 9, 1966

# RATIO OF APPRENTICES TO JOURNEYMEN

The ratio of apprentices to fourneymen shall not be more than one to each four journeymen employed, and there shall not be more than one apprentice to each journeyman on any one job. An apprentice shall only be employed in company with a journeymen.

## JOURNEYMEN AND APPRENTICES WORKING CONDITIONS FOR

- 1. Five days of eight hours each reckoned between 8:00 A.M. and 5:00 P.M. Monday to Friday, inclusive, shall be the regular week's work, except that the Company may designate a certain number of employees to work on Saturday from 8:00 A.M. to 12:00 noon. Saturday morning work from 8:00 A.M. to 12:00 noon shall be paid at straight time unless premium payments are required by any applicable statute.
  - ng is to be worked, one half day between Monday to Friday, inclusive shall be taken off. In the event that the work load does not permit one-half day off in advance of the Saturday morning worked, such time will be taken off later and at a time mutually agreed upon between the General Foreman and the individual employees, except as has been and may in the future be mutually agreed 2. During the week in which a Saturday mornotherwise.

and the second

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be given not later than quitting time on the Friday before. Notification of all other half days work 3. Notification of Saturday morning work shall shall be given not later than quitting time of the last regular shift worked.

#### Wage Group Number 1 EXHIBIT B

Truck Dispatcher Trunk and Toll Assigner Enstallation Dispatcher Maintenance Clerk Photographer Powerman Senior Dreftsman Senior Plant Assigned Statistical Clerk Communications Mainten amunications Service Construction Clerk Construction Disp Cable Splicer

only intermission for meals, except as provided.

in Article XIV.

Employees regularly assigned to the Chi-Operations when temporarily assigned to ime from the city limits to the job location and return and will be reimbursed for extra public

ú

work outside that'Area, will travel on Company

working hours shall be paid for at the rate of Sundays, and for continuous overtime, i.e., when work is continued through the next shift with

4. All time worked in excess of the regular lime and one-half, also for all work done on Management Date Olace 7 Trems - \$160.50 Week

gransportation expense incurred. When the temporary assignment is of more than two consecu-

iive working days duration, the employee may, in lieu of such travel time and extra transportation expense, and with the consent of the Company, elect to avail himself of the provisions of the current understanding in effect regarding reporting areas and transportation allowances for

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		160 %	•	13.00

bate Class II Towns - \$158.50 Week

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8888

Effective October 9, 1986

6. The Company agrees not to require members of the local Union to work on any job with

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employees regularly assigned to Suburban Opera-

Maximum Rate Class VI Towns - \$147.00 Week

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Maximum Rate Class IV Towns - \$156, 50 Wesk

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Maximum Rate Class V Towns - \$153, 50 West:

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Maximum Bate Class V Towns - \$117.50 Work

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· EXHIBIT B

Town Classifications - Wage Groups 14 to 18 Inclusive

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See schedules applicable to employees in the West Chicago. The Illinois Distributing House for Senegrapher, Supplies Order The Reports Clerk and Special Typis in Lies of Wage Groups 14 and 18.

Effective October 9, 1966

### G. C. EXH. 11

### CHECK LIST FOR HANDLING GRIEVANCES

It will be well to bear in mind that sometimes problems can be solved before they become grievances by predicting what reaction might be anticipated in a given situation. By explaining the reasons for the action, selling the fairness of the decision and trying to get the employee to understand why, the cause for a grievance may be eliminated.

When a grievance is presented, here are some ideas on suggested procedure and discussion which may be helpful:

### 1. Hear the Grievance

Let the grievant talk.

Don't interrupt, except to ask clarifying questions.

Give him the courtesy of a fair hearing.

Keep your temper.

Make notes for further reference.

Find out all you can about the problem.

Determine, through discussion, if there is an underlying cause for the grievance which does not appear on the surface.

If the grievant does not refer to it, be sure to ask what part of the Agreement is alleged to have been violated.

Draw out all facts the grievant can give about the complaint.

2. Decide whether you can give your answer now or whether you should postpone your decision until you have had more time to consider.

If you are sure of your decision, give the answer now. If you allow the grievance back down gracefully. See no. 5.

Explain why you must deny the grievance.

If the grievant is not satisfied, and says he'll appeal it, acknowledge that that is his privilege under the Agreement.

Give your supervisor all the facts, so he can be ready for the appeal, if it is processed.

### G. C. Exh. 12

### UNION AND PERSONNEL PROBLEMS

It would be worthwhile to consider what we might do to help field supervision who are confronted with Union and personnel problems. This opinion is prompted by personnel cases, grievances, and even arbitration cases which have occurred in the past year or more. Perhaps a clearer understanding of field supervision's role as members of management, and a knowledge of techniques and personnel consideration would help make them feel more secure and effective in their day-to-day personnel operations.

It is realized that most personnel cases are detected and resolved. However, there is some evidence that others are identified but tolerated, either covered up by sympathetic but misguided supervisors, or else allowed to exist because they are recognized as problems of long standing and their solution seems too difficult to achieve.

Perhaps where the latter situation prevails, field people are unduly influenced by similar cases where corrective measures may have been attempted or taken; but in the events which followed, the employee was reinstated because of facts or data which, later uncovered, placed management in an untenable position. Where reversals have taken place and those who were directly concerned with the initial action were not later acquainted with the reasons for reversal, we may have unwittingly created additional problems within our own management ranks.

To illustrate these points we have cases where:

- 1. Employee was dismissed for some infringement of Company policy, but later reinstated with or without a service break.
- 2. Disciplinary action taken, but later overruled where other controlling factors were introduced at a later date which negated the justification for the penalty inflected.

3. Action taken but not supported by higher levels which resulted in "burying" the case thereby conditioning a "to hell with it" attitude on similar situations in the future. Where failure to follow through was a factor, it may have been caused by a lack of understanding of management's responsibilities and prerogatives, a fear of involvement with the Union, etc.

After the identification of a personnel problem, it is essential that we build up a case step by step to insure a satisfactory conclusion, a correction of weaknesses or faults, or a separation from the payroll—other measures having failed. In processing these cases it is imperative and essential that:

- (a) We get all the facts. This does not presuppose that a statement or allegation by a management person is in itself a fact. Allegations must and should be supported by something more than an individual's opinion or judgment.
- (b) We must consider all the facts, not only those which support the action we desire to take. Mitigating circumstances not brought out, or factual data deliberately withheld but introduced later, places management in a embarrassing position, causes it to lose prestige while at the same time enhances the status of the Union in the eyes of its membership. The Union's basic function is to defend its people, and we recognize that this is a legitimate objective. However, we should not build up the Union's image through our own inept handling of such cases.
- (c) Disciplinary action must be taken where it is warranted but only after sober consideration has been given. It is difficult to completely eliminate emotions, but we must all be aware that emotions unchecked precipitate actions and decisions which may later be found to be improper.

In all instances we must take time out to reflect on all facets of the problem. There are no instances where we should summarily discharge people. In an extreme case we can even go to the extent of having people physically removed from the premises. We can best maintain our position through the use of suspension as opposed to dismissal. The value in this approach is that we secure the phychological effect of outright dismissal—the employee is inclined to think the worse. Suspension gives us time, time to recheck facts and minimize the extent to which emotions may have influenced judgment.

Where this reflection justifies the original judgment, dismissal may follow and in most instances will stand. If not, we can mete discipline and return the employee to the payroll at a later date in no way impairing our status as management people. Familiarity with our obligations under the Agreement will also do much to insure the success of the action we decide to take.

The above thoughts are set down more as a basis for thinking and consideration rather than for communicating to line management people at this time.

The subject calls for much deliberation as to type of approach we ought to develop to get these views across without having our motives misunderstood. It is not our intention to indulge in a witch hunt, but rather to give our management people a clear understanding of their responsibilities and prerogatives as management people; and, the techniques and assistance available to them in solving perhaps our most difficult problems—personnel problems.

8-14-62

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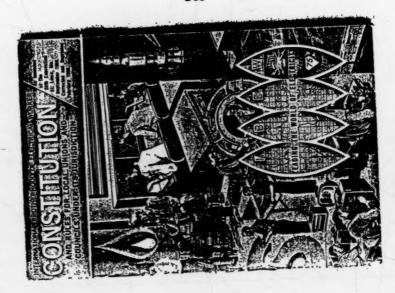
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**july 1, 1969** 



### ARTICLE XXII

### ADMISSION OF MEMBERS

Sec. 2. Each applicant for membership shall fill out an application blank furnished or approved by the I.S., and answer all questions. The original application or a copy must be sent to the I.S.

Sec. 3. The acceptance of an application for membership, and the admission of the applicant into any L.U. of the I.B.E.W., constitutes a contract between the member, the L.U. and the I.B.E.W., and between such member

and all other members of the I.BEW

Sec 4. Each applicant admitted, shall, in the presence of members of the I.B.E.W., repeat and sign the following obligation:

"I, ....., in the

presence of members of the International Brotherhood of Electrical Workers, promise and agree to conform to and abide by the Constitution and laws of the I.B.E.W. and its local unions. I will further the purposes for which the I.B.E.W. is instituted. I will bear true allegiance to it and will not sacrifice its interest in any manner."

Sec. 5. The obligation card signed by the applicant

shall be sent to the I.S.

The L.U. shall have each applicant, except as provided in Section 10 of this article, take the obligation before a regular meeting, or if it so decides, this may be done outside the regular meeting in the presence of the president or the vice president or the recording secretary.

### ARTICLE XXVI

### WITHDRAWAL CARDS—PARTICIPATING AND HONORARY

Sec. 5. The validity of any withdrawal card shall be dependent upon the good conduct of the member. It can be annulled by any L.U. or by the I.P. for violation of the laws of the I.B.E.W., or the bylaws and rules of any L.U., or for working with or employing non-members of the I.B.E.W. to perform electrical work, or for any action of the holder detrimental to the interests of the I.B.E.W. Membership in the I.B.E.W. is automatically terminated upon annulment of any withdrawal card.

A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with

provisions of the Constitution.

### ARTICLE XXVII

### MISCONDUCT, OFFENSES AND PENALTIES

Sec. 1. Any member may be penalized for committing any one or more of the following offenses:

(1) Resorting to the courts for redress of any injustice which he may believe has been done him by the I.B.E.W. or any of its L.U.'s without first making use, for at least a four-month period, of the process available to him under the I.B.E.W. Constitution including any appeal or appeals from any decision against him.

(2) Urging or advocating that a member, or any L.U.,

start action in a court of law against the

I.B.E.W., or any of its officers, or against a L.U. or any of its officers, without first exhausting all reme-dies through all the courts of the I.B.E.W.

(3) Violation of any provision of this Consittu-tion and the rules herein, or the bylaws, working agreements, or rules of a L.U.;

provision of this Constitution, or the bylaws or rules of a L.U., yet failing to file charges against the offender or to notify the proper officers of the (4) Having knowledge of the violation of any

(5) Obtaining membership through fraudulent means or by misrepresentation, either on the part of the member himself or others interested.

Advocating or attempting to bring about a withdrawal from the I.B.E.W. of any L.U. or of any member or group of members.

(7) Publishing or circulating among the membership, or among L.U.'s, false reports or misrepresen-

otherwise, or making oral statements, to public officials or others which contain untruths about, or which misrepresent a L.U., its officers or representatives, or officers or representatives of the (8) Sending letters or statements, anonymous or B.E.W.

(9) Creating or attempting to, create disastis-faction or dissension among any of the members or among L.U.'s of the I.B.E.W.

(10) Working in the interest of any organization (11) Slandering or otherwise wronging a member or cause which is detrimental to, or opposed to, the

(12) Entering or being present at any meeting of of the I.B.E.W. by any wilful act or acts.

a L.U., or its Executive Board, or any committee meeting, while intoxicated, or drinking intoxicants in or near any such meeting, or carrying intoxicants into such meeting.

(13) Disturbing the peace or harmony of any L.U. meeting or meeting of its Executive Board, using abusive language, creating or participating in any disturbance, drinking intoxicants, or being in-toxicated, in or around the office or headquarters of

(14) Making known the business of a L.U. to persons not entitled to such knowledge.

(15) Fraudulently receiving or misappropriating any moneys of a L.U. or the I.B.E.W.

ing dual unionism, secession, schism, unauthorized work stoppages or strikes or other violation of the (16) Attending or participation in any gathering or meeting whatsoever for the purpose of advocatlaws and rules of the I.B.E.W. or its L.U.'s.

(17) Mailing, handing out, or posting cards, handbills, letters, marked ballots, or displaying streamers, banners, signs or anything else of a vior being a members to vote for or against any candidate or candidates for L.U. office, or candidates to convenparty in any way to such act in an effort to induce tions, fraudulent, or libelous nature, Hons.

(It shall not be considered an offense when a L.U. mails out-or posts in a conspicuous place-a sample of the official ballot to be used in any L.U. election. However, the sample shall not carry any markings of any kind-except that the word "SAMPLE" shall appear prominently across the face of the ballot. The sample shall otherwise be an exact duplicate of the official ballot to be used.) (B) The distribution of this official L.U. publication, properly prepared as set forth above, shall not be in violation of Article XVIII, Section 20.

sent of the I.P. Any member, any officer or repre-sentative of any L.U., or other organization coming under the I.B.E.W.'s jurisdiction, shall be held lis-ble for allowing individuals or agencies to solicit such advertising without consent of the I.P. or for I.B.E.W., or the names or pictures of I.U. or Inter-national officers appear in such matter without conetc., when the name of a L.U. or (18) Soliciting advertising for yearbooks, in any way violating this provision.

(19) Failure to install or do his work in a safe, workmanlike manner, or leaving work in a condition that may endanger the lives or property of others, or proving unable or unfit mentally, to learn properly his trade.

(20) Causing a stoppage of work because of any alleged grievance or dispute without having consent

clared in difficulty with a L.U. or the I.B.E.W., in (21) Working for any individual or company deaccordance with this Constitution. of the L.U. or its proper officers.

(22) Wilfully committing fraud in connection with obtaining or furnishing credentials for dele-

gates to the I.C. or being connected with any fraud in voting during the I.C.

in any manner, his membership card, receipt, or other evidence of membership in the I.B.E.W. (23) Allowing another person to use, or altering

Any member convicted of any one or more of the above-named offenses may be assessed or suspended, or both, or expelled.

to the reasonable attorneys' fees and costs incurred by the I.B.E.W. or L.U. as a result of said violation in addition to, or in lieu of, any other penalty. above, the member may be assessed an amount equal In case of conviction of violation of subsection (1)

victed of any, one or more of the above-named offenses, he may be removed from office or position, If an officer or representative of a L.U., is conor assessed or suspended, or both, or expelled.

an amount equal to the reasonable attorneys' fees and costs incurred by the I.B.E.W. or I.U. as a re-sult of said violation in addition to, or in lieu of, any above, the officer or representative may be assessed In case of conviction of violation of subsection (1) other penalty.

Council, System Council or other subordinate body shall be obliged to exhaust all remedies provided for before starting an action in a court of law against the I.B.E.W., L.U. or other subordinate body. in this Constitution, including all available appeals, Every member, officer, Local Union,

The initials "L.U.'s," as used throughout this article, shall include Railroad Councils, System Councils and other subordinate bodies where applicable.

# Charges and Trials

Scc. 2. All charges, except against officers and representatives of L.U.'s, shall be heard and tried by

the L.U. Executive Board which shall not us the triel board, in accordance with Article XIX. A. majority vote of the board shall be sufficient for decision and sentence.

(This section shall not be construed to conflict with power of the I.P. or the I.E.C. to take action in certain cases, as provided in Articles IV and IX.)

Sec. 3. All charges against a member or members must be presented in writing, signed by the charging parky, and specify the section or sections of this Constitution, the bylaws, rules, or working agreement allegedly violated. The charges must state the act or acts considered to be in violation, including approximate relevant dates or places.

Sec. 4. Charges against members must be submitted to the R.S. of the L.U. in whose jurisdiction the alleged act or acts took place within 30 days of the time the charging party first became aware, or ten conaby should have been aware, of the alleged act or acts. The charges shall be read but not discussed at the next regular meeting of the L.U. following the filing of the charges. The R.S. shall immediately send a copy of such charges to the accused member at his last known address together with written noting beard.

Sec. 5. The trial board shall proceed with the case mot later than 45 days from the date the charges were filed. The board shall grant a reasonable delay to the accused when it feels the facts or circumstances warrant such a delay. The accused shall be granted a fair or impartial trial. He must, upon request, he allowed an I.B.E.W. member to represent him.

Sec. 6. When the trial board has reached a decision, it shall report its findings, and sentence, if

any, to the next regular meeting of the L.U. Such report or action of the board shall not be discussed or acted upon by the L.U. The action of the trial board shall be considered the action of the L.U. and the report of the board shall conclude the case, or cases, except for the accused having the right of appeal to the LV.P., then to the I.P., then to the I.E., cand then to the I.C. and then to the I.C. Govern, the board may reopien and reconsider any case or cases when it feels the facts or circumstances justify doing so, and it shall do so when directed by the I.V.P. or I.P.

Sec, 7. If the accused wilfully fails to stand trial —or attempts to evade trial—the trial board shall proceed to hear and determine the case just as though the accused were present.

# Trials of Officers and Representatives

Sec. 8. All charges against an officer or representative of a L.U. must be presented in writing, signed by the charging party, and specify the section or sections of this Constitution, the bylaws, rules or working agreement violated. The charges must state the act or acts considered to be in violation, including approximate relevant dates and places; and must be made within 30 days of the time the charging party first became aware, or reasonably should have been aware, of the alleged act or acts.

Such charges must be filed with the I.V.P. in whose district the I.U. is located where the alleged act or acts took place, or as directed by the I.P., should more than one district be involved. However, if such charges are against an officer or representative of a railroad L.U., or an officer, general chairman or representative of a Railroad Council,

these shall be filed with the I.V.P. in charge of rail-

(This section shall not be construed to conflict with power of the I.P. or the I.E.C. to take action in certain cases, as provided in Articles IV and IX.)

Sec. 9. The I.V.P. shall pass upon and determine such case or cases, with the accused having the right of appeal to the I.P., then to the I.E.C., then to the I.C. Any such appeal, to be recognized, must be made within 30 days from the date of the decision appealed from. No appeal from the I.V.P. shall suspend operation of any decision.

Sec. 10. The I.V.P. may require that all evidence, testimony, or statements be submitted to him in writing for review, decision and sentence (if any) or he may hear the case in person. If he so decides, he may appoint a referee, who may or may not be a member, to take testimony and report to him.

Sec. 11. The LVP. may reopen any case or cases when there is new evidence, or testimony, facts or electromatances, which he feels are sufficient to justify such being done.

# Appeals

Sec. 12. Any member who claims an injustice has been done him by any L.U. or trial board, or by any Railroad Council, may appeal to the LV.P. any time within 45 days after the date of the action complained of. If the appeal is from an action of a railroad local union, or a Railroad Council, it must go bo the LV.P. in charge of railroad matters.

A copy of any appeal must be filed with the L.U., or with the Railroad Council, as the case may be.

Sec. 13. No appeal for revocation of an assessment shall be recognized unless the member has first

paid the assessment, which he can do under protest. When the assessment exceeds \$25, payments of not less than \$20 in monthly installments must be made. The first monthly installment must be made within 15 days from the date of the decision rendered and monthly installments continued thereafter or the sppeal will not be considered.

Sec. 14. When a decision has been rendered by the I.V.P. it shall become effective immediately.

Sec. 16. No appeals from decisions of the LVP, of from the I.P., or from the I.E.C., shall be recognized unless the party or parties appealing have compiled with the decision from which they have appealed. However, this section may be waived by the party making the decision if good and sufficient reasons are furnished and he is requested to do so.

Sec. 16. Appeals to the I.P. and to the I.E.C., and to the convention, to be considered, must be marke within 30 days from the date of the decision appealed from. (Appeals to the I.E.C. and to conventions must be filed with the I.S.) If no appeal is made within 30 days from the date that any decision is rendered, such decision shall be considered

Sec. 17.. Any member penalized or otherwise disciplined for an offense may appeal.

Sec. 18. When an appeal is taken above the LV.P., only the evidence submitted in the original case of anneal shall be concluded.

In cases where parties claim they have new and important evidence affecting a case in which declsion has been rendered, they may submit this within 30 days to the authority who rendered the first decision, with a request that the case be reopened. Such authority shall decide whether the matter subnitted justifies reopening the case.

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### Record of Attendance

#### Danny Covington, Building Cable Apprentice

Wo record maintained for first four weeks.

12-13-69 - Did not show up for Saturday Tour (2nd time)

12-15-69 - Absent - Personal Business (No reason)

12-19-69 - 4 hours - Personal Business

12-22-69 - 2 hours late ( docked )

12-26-69 - 1 hour late ( docked ) 1- 9-70 - 10 minutes late

1-12-70 - 10 minutes late

l-13-70 - 30 minutes late l-19-70 - 4 hours - Personal Business (Jail)

1-21-70 - 1 hour late 2- 4-70 - Absent - flu

2-10-70 - 1 hour late

2-16-70 - 20 minutes late (Plant School) .

2-17-70 - Absent - Toothache (Did not show up at Plant School and did not call until 11:00 a.m.)

2-19-70 - 1 hour late - Brought in to Construction Office and dismissed.

Mr. Covington and the Union were informed on January 13, 1970 that further tardiness or unsubstantiated absence would lead to dismissal.



## Illinois Bell Telephone Company

March 28, 1969

Mr. T. S. Pioretti District Installation Supt. Franklin District

The following will serve as a documentation of the series of events that occurred on Friday, March 28, 1969, from 8: A.M. until 4:30 P.M. at The First National Bank of Chicago.

At 8:00 A.M., using payday as a vehicle to communicate to all the craft (38) at one time, I scheduled a general meeting. Foints to be covered at the meeting were as follows:

- 1. Coffee Breaks In an effort to eleviate the problems we are encountering with elevator service in the building, it was my decision to split the coffee break into two locations within the building, All-craft working below the 22nd floor, effective Monday, Earch 31st, will report at 8:00 A.M. to a predetermined room in the 3rd basement. All craft working above the 23rd floor will report to the 34th floor, the scene of our present office, pre-wire room, etc. Both locations will be sequred, the men can change clothes, est lunch, and have a coffee break in these rooms. It was especially noted that under no circumstances would any craftsman leave the building without first notifying me, and discussing their reasons for leaving. At this point I was interrupted by one of the men, who stated that I was not always available to them and what should they do in that instance. I related to all, that Mr. Full, my T-13, Mr. Hroch, my steward, or Mr. HcCarthy, the Chief Steward for Franklin District, would be available and could act in my absence. All understood, and all concurred.
  - 2. Problem with keys As you know, the keying system for the telephone closets in the bank, at this time, is such that I have two separate keys for each floor in the building, one for the east shaft and one for the west. This gives me a total of about 60 keys that we have signed for and must be managed. I have a clip board system where the men can get the key they need. However, certain individuals are forgetting to return the keys and have taken them home, and in one instance the keys for one shaft have been lost. The procedure for obtaining and returning the keys was reviewed at this time.

Mr. T. S. Fioretti March 28, 1969

- 3. Floor plans A similar condition exists in this area, and again reviewed as to the importance of the floor plans being returned after use. Several of the other trades seem to cotton to our floor plans, as they are more detailed and the furniture layout and overall office arrangement is more easily recognizable.
- 4. Security In lieu of the events of the past week, and here I am referring to the rash of thievery that all trades are experiencing in the building, I again reiterate the fact that they must at all times lock their shafts, secure their own personal tools and return to the tool locker any large items, i. e., electric drills, heaters, etc.
- 5. Alcoholic Beverages I had an experience in the past week whereby a craftsman left the building at 12:00 o'clock noon and returned shortly thereafter with sandwichos and a can of beer. Upon seeing him I told the individual that at no time and under no circumstances would alcoholic beverages be carried into the building on this job. In the event he was seen by the other craft I used this opportunity to express to all concerned the fact that alcohol has no place in our job duties, and will not be tolerated.

The meeting was then opened for general discussion and several ideas, unrelated to the five topics mentioned above, were exchanged and discussed.

At approximately 12:30 P.M. I went to Mr. Fioretti's office in Room 679 of the old bank building, to drop off some papers he had asked for and to pick up my mail, which is delivered there. We discussed some matters and I returned to my camp on the 34th floor. At 1:00 o'clock P.M. Mr. Fioretti and Mr. Hubbards entered my office and expressed a desire to tour the upper floors, to evalute the status of construction of the tenants' spaces. Having-accomplished our objectives I returned to the 34th floor and proceeded to visit my pre-wire room where I have 5 craftsmen assemblying and pre-wiring frames for the telephone clocats. Mr. Gerald Woods and Mr. Steve Molk were missing from their job locations and I inquired of Ray McCarthy if he knew where the men were. He replied that he did not, and I went to my office to find Ed Full, to see if he knew their whereabouts. Upon entering my office I overheard Mr. Full talking on the telephone. He was telling someoff to get back to the building as soon as possible. When I heard this I asked him who he was talking to and to give

Mr. T. S. Floretti March 28, 1969

me the phone. The party hung up upon hearing my voice in the background. I asked Ed who was on the phone. He said Steve Molk, and I asked where he was. Ed said at the 181 West Madison Grill. I told him to take one elevator and pick up Mr. Hroch (the steward) from his job location and I would take another and meet him on the first floor lobby. It was my intent at this point to meet him on the first floor and back to the building and have a confrontation with them myself, and with their union steward. We waited on the first floor and they did not return. About fifteen minutes passed and I told Mr. Full and Mr. Hroch to remain in the lobby and wait for them to return, because I was going to the bar to find them and I might miss seeing them. I entered the 181 West Madison Grill about 3:30 P.M. and found Mr. Molk and Mr. Woods sitting at the bar with drinks in front of them and money on the counter. They were, in my opinion, inebriated. I told both of them they were off the payroll, that I could do nothing for them and that they would be hearing from their union representative. They both nodded their heads, but did not say a word. I stood there a moment and then left without further conversation. I waited outside for a few moments, and when they made no attempt to come out I returned to the lobby, picked up Mr. Full and Mr. Hroch and proceeded to Mr. Fioretti's office to relate what had happened.

Pootnote: Considering the fact that I held a meeting at 8:00 A.K. this very day and discussed not leaving the building and not to consume alcoholic beverages, it is my personal feeling that the two men in question were in direct defiance of my endeavors for better job performance, and it is my recommendation that they be terminated.

J. P. Howe PBX Foreman

### APPLICATION FOR MEMBERSHIP

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS Local No. B-134

CHICAGO 7, ILLINOIS

INITIATION FEE \$ 1000

Desiring to become a me				to your Local Un	ion
with the accompanying fee a	nd vouchers, I an	e chetri	cian		
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Why did you discontinue you	r membership?				_
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If so, where?					
How long have you been in	the electrical busi	ness? 2 Me	are		
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Failure to comply with sufficient cause for the forfei Brotherhood or may hereafte	ture of any sum	of money I hav	e paid with thi	s application to	e a the
I also agree that twenty and that the full amount of i application; failure to do so fee.	nitiation fee will shall be a forfeitu	be paid within are of all monies	ninety (90) day I have paid to	es from the date wards this initiat	of
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International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company) and Bell Supervisors Protective Association (Not a Labor Organization). Case 13-CB-2890

### July 14, 1971

### DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING, JENKINS, AND KENNEDY

On June 29, 1970, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondents have engaged in and were engaging in certain unfair labor practices within the meaning of the Act, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, both Respondents (hereinafter referred to as Respondent International and Respondent Local) and the Charging Party (herein referred to as the Association) filed exceptions to the Decision and supporting briefs. The General Counsel has filed a brief in support of the Trial Examiner's Decision, cross-exceptions to the Trial Examiner's Decision, and an answering brief to the Respondent International's exceptions.

On September 2, 1970, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that this case be consolidated with one other 1 for the purpose of oral argument before the Board. On October 5, 1970, these cases were argued orally before the Board. The Board 2 has reviewed the rulings of the Trial

The Board has reviewed the rulings of the Trial

<sup>&</sup>lt;sup>1</sup>Local Union No. 2150, International Brotherhood of Electrical Workers, AFL-CIO (Wisconsin Electric Power Company), 192 NLRB No. 16, issued this day.

<sup>&</sup>lt;sup>2</sup> Member Ralph E. Kennedy, who succeeded to the Board after the oral argument presented by the parties, has reviewed the entire

Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral arguments, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent with our Decision and Order.

Illinois Bell Telephone Company, hereinafter referred to as Illinois Bell, or its predecessors and Respondent Local have maintained a contractual relationship since 1909. Respondent Local represents Illinois Bell's Chicago employees in the "Plant Department," including not only journeymen and apprentices employed as PBX installers but also persons employed as "P.B.X. Installation Foremen," "Building Cable Foremen," and "General Foremen." According to the terms of the collective-bargaining agreement all members of the bargaining unit, including the above-named foremen, must become and remain members of Respondent Local.

record in this case including the arguments advanced during oral argument and is participating in the disposition of this case.

<sup>3</sup> Article II, section 1(a) and exhibit A of the 1968-71 and all prior collective-bargaining agreements since 1948 provide in perinent part:

### Article II, section 1

(a) This Agreement covers all those employees of the Company in the group represented by Local Union No. 134, whose titles are included in Exhibit "A"....

### Exhibit A

Wage Group Number 1 General Foremen

Wage Group Number 2
PBX Installation Foremen
Building Cable Foremen

<sup>4</sup> Article III, section 1 of the 1968-71 and all prior collective-bargaining agreements since 1948 provide in pertinent part:

All employees with thirty days or more of employment with the Company, who are represented by Local Union No. 134 At one time the collective-bargaining agreement between the parties prescribed the monthly wage rates for the "foremen" listed above. However, in recent agreements no wage provisions have been included but the agreement includes a section entitled "Working Conditions for General Foremen and Foremen" which concerns payment for overtime work and for certain absences. Another contract clause provides that the appointment of general foremen may not be made for a period of less than 5 days. Further, other evidence in the record shows that when Illinois Bell recently revised its foremen overtime schedule it requested the concurrence of Respondent Local.

Between May 8, 1968, and September 20, 1968, Respondent Local engaged in an economic strike against Illinois Bell. At the inception of the strike, Illinois Bell informed the foremen that although it would like to have them come to work the decision whether to work or to respect the strike was a matter of personal discretion, and that those who chose not to work would not be penalized. On the other hand, at a Respondent Local union meeting just prior to the strike a representative of Respondent Local, in response to a question, warned that it would be the policy of the Union to discipline any foremen who performed rank-and-file work during the strike. It appears that a large number of the foremen were present at this meeting and heard the Union's warning. Thereafter, in response to the Respondent Local's warning, several foremen formed the Bell Supervisors Protective Association and through it retained counsel to protect the rights of those foremen who chose to work during the strike.

During the course of the strike some of the foremen continued to report for work and performed rank-and-file work, and other foremen stayed away from work. After the strike Illinois Bell in no way discriminated against the latter groups, and indeed promoted some of them to higher positions.

shall become and remain members of Local Union No. 134 in good standing as a condition of employment under this agreement. . . .

The record reveals that Respondent Local thereafter carried out its earlier announcement and commenced union proceedings against a number of foremen, and imposed fines of \$500 on foremen who performed struck work and \$1,000 fines against each of five foremen who were instrumental in forming the Association. Most of the fined foremen appealed to the International, which, except where there was procedural irregularity, sustained the fines. Both at the proceedings before the Local and on the appeal to the International it was urged by the foremen that the union-security clause which compelled them to remain members of Respondent Local was illegal. Illinois Bell has reimbursed these foremen for the full amount of the levied fines which they paid.

The Trial Examiner concluded that the Respondent Local, by imposing on foremen 5 possessing the power to adjust grievances fines for crossing the Respondent Local's picket line and performing struck work, violated Section 8(b)(1)(B) of the Act. He reasoned that the Respondent Local's action impinged on the Loyalty which Illinois Bell should be able to expect from its supervisors who are the "Employer's representatives" for the adjust-

<sup>5</sup> The Respondents have excepted to the Trial Examiner's finding that foremen and general foremen were "Employer representatives." The record clearly shows that the foremen and general foremen do actually participate in the adjustment of grievances and therefore are, for the purposes of Sec. 8(b)(1)(B). "Employer representatives." The Trial Examiner has, however, refused to find that persons occupying the positions of assistant staff supervisor and engineer are "Employer representatives" for the purposes of Sec. 8(b)(1)(B). We agree with the Trial Examiner. The three assistant staff supervisors occupy nonsupervisory positions and do not have any contact with the grievance adjustment procedure. It is true that these persons were formerly foremen and expect to be returned to the supervisory hierarchy in a year or two. However, it is clear that the Company has no immediate expectation of having these persons represent it in collective-bargaining and grievance adjustment. Further, the record, although sparse, clearly shows that the two engineers occupy nonsupervisory staff positions with duties which do not include participation in the collective bargaining and the adjustment of grievances. See Toledo Locals Nos. 15-P and 272 of the Lithographers and Photoengravers International Union, AFL-CIO (The Toledo Blade Company, Inc), 175 NLRB No. 173, enfd. 437 F.2d 55 (C.A. 6).

ment of grievances and therefore restrained and coerced Illinois Bell in violation of Section 8(b) (1) (B) of the Act. The Trial Examiner also found that the Respondent Local violated Section 8(b) (1) (B) by fining the supervisor-organizers of the Association since, although not sponsored by the Company, it was part and parcel of the overall attempt by the Respondent Local to restrain and coerce Illinois Bell in the selection of its representatives for the adjustment of grievances. Finally, the Trial Examiner concluded that Respondent International also violated Section 8(b) (1) (B) by affirming, on appeal, the imposition of those fines by the Respondent Local.

We agree with these findings of the Trial Examiner. The Union in this case, as the union in Local Union No. 2150. International Brotherhood of Electrical Workers.

In the light of the above, we agree with the Trial Examiner, for the reasons set forth in his Decision, that in this case it was clear that the International, by its review, sustained fines imposed in violations of a Federal law after the validity of these fines under that law had been placed in issue before it and thereby violated Sec. 8(b)(1)(B) of the Act.

<sup>&</sup>lt;sup>6</sup> The International has excepted to the Trial Examiner's finding that it violated Sec. 8(b)(1)(B) by affirming Local 134's fining of the union member supervisors for doing struck work. It argues that it should not be held liable for its purely appellate review of the local's fines. The International asserts there is a common law principle which provides that an international union is not answerable in damages to a wrongfully suspended or expelled member when its only action taken was in the nature of an appellate review of the local's actions. The two New York common law cases, People ex rel. Solomon v. Brotherhood of Painters, Decorators & Paperhangers, 218 N.Y. 115, 112 N.E. 725 (1916), and Schouten v. Alpine, 215 N.Y. 225, 109 N.E. 244 (1915), cited for this principle are inapposite. Here, unlike those cases, the International affirmed an appeal of fines which "on their face" were violative of the Act. Further. those who appealed the fines in this case specifically raised the question of whether the fines were legal under the statute. United Brotherhood of Carpenters (Endicott Church Furniture Inc.) v. N.L.R.B., 286 F.2d 533 (C.A.D.C., 1960), also relied upon by the International, involves, in part, the court's refusal to find an international union in violation of the Act because it approved work rules which could have been applied in a legal manner rather than, as they were applied, in an illegal manner. Here the fines "on their face" were unlawful and this situation was argued vigorously to the International by the supervisors when they made the appeal.

AFL-C10 (Wisconsin Electric Power Company), 192 NLRB No. 16 issued this day, fined union member supervisors for doing the work of the rank-and-file union members during the course of a strike against Illinois Bell. We find no discernible difference between the two cases, and for the reasons set forth in that case, we find that, in the instant case, the Union violated Section 8 (b) (1) (B) by fining union member supervisors for doing struck work since the underlying dispute giving rise to the fines was between the Union and Illinois Bell rather than between the Union and its supervisor-members.

The Trial Examiner has also found that the Union violated Section 8(b)(1)(B) by fining five supervisors for organizing the Bell Supervisors Protective Association. We agree, for the reasons set forth in the Trial Examiner's Decision, that while the Company was not active in the formation of the Association, the creation of the Association was for the purpose of protecting the rights of those supervisors who were fined unlawfully for doing struck work which furthered the interests of the Company. Consequently, we conclude, as did the Trial Examiner, that the fining of these supervisors for forming the Association must be considered as part of the Union's overall effort to coerce and restrain the Employer in selecting its representatives.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner, as herein amended, and orders that the Respondents, International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO, their officers,

It is not the purpose of the Board to become involved in the private arrangements made between individual supervisors and Illinois Bell about how the union-imposed fines were to be paid. It is clear that the fines were assessed against the supervisors individually and therefore we shall follow our customary practice and direct that the Union reimburse the supervisors rather than Illinois Bell.

agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order, as herein modified:

1. Delete paragraph 2(b) and substitute the following:

"Reimburse the supervisory employees for any and all sums paid by them pursuant to the fines referred to in the preceding paragraph, and advise in writing each supervisor against whom such fines were levied that the fines have been rescinded and that the records thereof have been expunged; provided: that the action required in this subparagraph shall be primarily required of the Respondent Local, and shall be required of Respondent International only to the extent that Respondent Local shall fail to give the written notices and pay the sums herein required."

2. Substitute the attached notice for the Trial Exam-

iner's notice.

# MEMBER FANNING, dissenting:

At issue herein is whether restraints imposed on supervisors by their union for their performance of duties not related to their supervisory functions constitute "restraint and coercion" of their employers within the meaning of

Section 8(b) (1) (B).

The relevant facts may be summarized briefly as follows: Prior to a strike called by Respondent Union, a membership meeting was held by Respondent at which members who held supervisory positions were advised that they would be subject to union discipline if they performed rank-and-file work during the strike. The Employer informed the supervisor-members that it wished to have them come to work to perform rank-and-file work, but that the decision to work was left to their discretion and could be exercised without fear of penalty if they chose not to work. During the course of the strike some supervisor-members performed rank-and-file work; others refrained from working. After the strike, the Employer imposed no penalties for failure to work and, in fact, promoted some supervisors who had refused to work to higher positions. Respondent, after appropriate proceedings, imposd fines of \$500 on supervisor-members who performed rank-and-file work during the strike.

Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization to "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Thus, the prohibited practice is the restraint or coercion of the employer, not in any general sense, but solely in the selection of his representatives-not just any representative—but only those who perform collectivebargaining functions or engage in the settlement of grievances. On the facts of this case, it is clear that the Employer felt no restraint or coercion from the Union's action; it left the decision whether to work entirely to the discretion of the individual supervisors, and promoted some who had refused to work. Nevertheless, the law has developed so as to include within the statutory concept of restraint and coercion of an employer, union disciplinary actions which in fact are directed towards compelling a supervisor's allegiance to his union rather than to his employer with respect to his performance of collectivebargaining or grievance-adjustment functions or his performance of duties which are directly related to or which may be said reasonably to grow out of his performance of such functions.\*

<sup>8</sup> The cases cited by the majority in support of their decision all involve fines of supervisors imposed by their union because of the manner in which they discharged such functions. I agree with the Trial Examiner that they are distinguishable from the instant case. With respect to the Trial Examiner's view that the decision in the first A. S. Horner case (176 NLRB No. 105) compels the result herein, I believe he misconceives the role of the fined supervisor. There the supervisor was fined because he gave an antiunion speech during an election campaign. Though the injury to legitimate union objectives is comparable to that flowing from the supervisor's performance of struck work in this case, the supervisor was performing a normal supervisory function of informing employees of how management preferred to deal with employee grievances and complaints-a system of direct dealing with employees rather than dealing with them through a representative. So viewed, the case may come within the San Francisco-Oakland Mailers' decision. However that may be, I did not participate in Horner and do not regard myself as bound by its holding.

However, to constitute restraint or coercion of the employer in the statutory sense, it is necessary that the restraints imposed on the supervisor must be restraints on his actions in such matter, not on his actions on other matters. For it is only in the denial to the employer of the unrestrained performance of such functions by one whom he has selected for that purpose that the employer can be said to be coerced in the selection of a representative to act in such matters. As the Board said in the San Francisco-Oakland Mailers case. "Realistically. the Employer would have to replace its foremen or face de facto nonrepresentation by them." 9 If the restraint is imposed upon the supervisor because of his actions in matters unrelated to his general supervisory functions there is no restraint upon the employer with respect to his selection of representatives to perform such functions though he may of course be restrained in the selection of representatives to perform other functions. The Board has in fact recognized this distinction as valid in the Syd Gough case 10 where it found no violation of Section 8(b) (1) (B) in a fine of a supervisor (who had grievance-adjustment responsibilities) for his failure to register at the union's hiring hall. That decision necessarily stands for the proposition that a union-imposed restraint upon a supervisor because of matters unconnected with his performance of collective-bargaining functions does not restrain or coerce him in the performance of the latter functions and, that being the case, there is no restraint or coercion of the employer in the statutory sense.

Here the supervisors were not fined because they gave directions to the work force, interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union. They were fined because they performed produc-

<sup>&</sup>lt;sup>9</sup> San Francisco-Oakland Mailers' Union Local No. 18, International Typographical Union (Northwest Publications), 172 NLRB No. 252.

<sup>&</sup>lt;sup>10</sup> Local Union No. 453, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (Syd Gough and Sons, Inc.), 183 NLRB No. 24.

tion work in the bargaining unit during a strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. As the Supreme Court has held, fines of members who act as strikebreakers during a strike do not "restrain or coerce" them within the meaning of Section 8(b) (1) of the Act.11 If the fine of an employee-member for engaging in strikebreaking does not restrain or coerce him within the meaning of Section 8(b) (1), I cannot see how the same restraint imposed upon a supervisor-member for the same activity can be broadened into restraint and coercion of the employer within the meaning of that section. All the restraint does, if successful, is to deny the employer the use of the supervisor as a production worker during the strike.12

My colleagues argue, however, that,

clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would not permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. More-

<sup>11</sup> N.L.R.B. v. Allis Chalmers Manufacturing Co., 388 U.S. 175.

<sup>12</sup> If the Employer had requested his supervisors to perform their normal supervisory functions in the direction of replacements or other workers during the strike, we would have a different situation.

over, such fines clearly interfere with the Employer's control over its own representatives.<sup>13</sup>

The argument would be more appropriate if Section 8(b) (1) also made it an unfair labor practice for a union to induce or require supervisors to align themselves with the union on any matters.

However, the section does not contain such an unfair labor practice. Moreover, though the 1947 amendments did exclude supervisors from the definition of employee 14 and declared that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining," 15 it also declared that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization." 16 The effect of these various provisions is a denial of any statutory protection to supervisors either in their joining or assisting a union or in their refraining from such activities. It leaves the employer free to prohibit such activities or to permit them, to discharge supervisors for engaging in such activities if he desires. Congress gave employers this freedom to deal with supervisors precisely because of the problem of "dividend loyalties." 17 It stopped short, however, of making it an unfair labor practice for a labor organization to organize supervisors or to admit them to membership. The only limitation it placed on unions in this regard is the narrow prohibition against restraining or coercing employers in the selection of representatives (including supervisors, but not limited to supervisors) for purposes of collective bargaining or the adjustment of grievances. My colleagues, in effect con-

<sup>&</sup>lt;sup>13</sup> Wisconsin Electric Power Co., 192 NLRB No. 16, incorporated by reference in the majority opinion herein.

<sup>&</sup>lt;sup>14</sup> Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 152(3).

<sup>15 29</sup> U.S.C. 164(a).

<sup>16</sup> Ibid.

<sup>&</sup>lt;sup>17</sup> S. Rept. 105 on S. 1126, pp. 3-5, I Leg. Hist. 409-411 (1947).

strue this as a bill of rights freeing supervisors from any restraint or coercion by a labor organization, even where the effect is not to deny their employer the uncoerced performance of collective-bargaining or grievance-adjustment functions.

This construction goes far beyond that intended by Congress as disclosed by the relevant legislative history of the section: As first proposed in S. 1126, the section prohibited a labor organization from interfering with, as well as restraining or coercing, an employer in the selection of his bargaining representatives. Senate Report 105 on S.1126, stated

Section 8(b) (1): This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances. Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association, which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.<sup>18</sup>

This same refrain—the prohibition of forcing employers into or out of employer associations or of compelling them to remove or discharge supervisors or personnel directors who engage in the settlement of grievances—is repeated in the remarks of Senator Taft and other Senators during floor debate on the bill.<sup>19</sup> Although no Senator addressed himself to the precise question presented in this and the other cases cited by the majority, namely, the conditions under which coercion of the representative becomes or constitutes coercion of the employer in the selection of the representative, I believe the legislative history

<sup>18</sup> At p. 21, I Leg. Hist. 427 (1947).

 <sup>&</sup>lt;sup>19</sup> 93 Cong. Rec. 3953 (II Leg. Hist. 1012), 93 Cong. Rec. 4266
 (II Leg. Hist. 1077), 93 Cong. Rec. 5106 (II Leg. Hist. 1454).

demonstrates that unless the union-imposed restraint on a supervisor is imposed because of his discharge of duties involved in the performance of the statutorily described functions or in the discharge of duties closely related thereto, the restraint or coercion is not proscribed by the section. At most, restraint imposed on the supervisor because of his performance of other functions constitutes an interference with the employer's selection of representatives for the performance of collctive-bargaining or the adjustment of grievances functions assigned to such representatives, as indeed the majority opinion finally concludes with respect to the fines in this case. However, the words "interfere with" were eliminate from the section by an amendment offered by Senator Ives because of their far-reaching impact.20 I cannot agree to the reinsertion of those words by decisional interpretation.

In summary, because the fines involved herein were not imposed upon the supervisors because of the manner in which they performed duties related to their collective-bargaining or grievance-adjustment functions, but were imposed because of their violation of an unrelated union rule proscribing members of the union from performing struck work during a strike, I find that the supervisors were not restrained or coerced in the performance of the statutorily protected functions. It follows that the Employer was not restrained or coerced in the selection of representatives to perform such functions. Accordingly

I would dismiss the complaint.

## APPENDIX

NOTICE TO MEMBERS
NATIONAL LABOR RELATIONS BOARD
POSTED BY ORDER OF THE
An Agency of the United States Government

WE WILL NOT fine or otherwise discipline supervisory employees of Illinois Bell Telephone Company (such as, for example, P.B.X. installation foremen) for engaging in productive work during a strike or for participating in

<sup>20 93</sup> Cong. Rec. 4398 (II Leg. Hist. 1138-39).

any organization designed to counsel and protect such supervisors in the event they work during a strike.

WE WILL NOT in any like or related manner restrain or coerce Illinois Bell Telephone Company in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL rescind, and expunge from our records, the fines levied against supervisory employees for working during the 1968 strike or for having formed the Bell Supervisors Protective Association.

WE WILL refund to the Illinois Bell Telephone Company the sums it has paid pursuant to the fines we levied against supervisors in connection with the 1968 strike.

WE WILL advise in writing each of the supervisors fined in connection with the 1968 strike that his fine has been rescinded and expunged, and that we will reimburse each the sums paid pursuant to those fines.

LOCAL 134, INTERNATIONAL BROTHER-HOOD OF ELECTRICAL WORKERS, AFL-CIO

(Labor Organization)

Dated By

(Representative)

(Title)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO (Labor Organization)

Dated By

(Representative)

(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, de-

faced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 881, Everett McKinley Dirksen Senate Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7575.

### TRIAL EXAMINER'S DECISION

#### STATEMENT OF THE CASE

FREDERICK U. REEL, Trial Examiner: This proceeding, heard at Chicago, Illinois, from March 31 through April 3, 1970, pursuant to a charge filed June 10, 1969, and a complaint issued December 31, 1969, arises out of certain fines levied by the Respondent Local and confirmed by the parent, Respondent International, upon certain of their members for either (a) continuing to perform work for their Employer during the course of the Local Union's strike against that Employer or (b) forming and becoming officers in an association (the Charging Party herein), the purpose of which was to furnish assistance and counsel to foremen who worked during the strike. The primary issue in the case is whether the imposition of these fines violated Section 8(b)(1)(B) of the Act, in view of the fact that in each instance the person fined was employed in what is allegedly a supervisory capacity, and allegedly represented his Employer in the adjustment of grievances. Respondents, denying that the persons fined were supervisors or that they adjusted grievances. further contend that in any event, under the circumstances of this case, the fines did not as a matter of law involve the Respondents in violation of Section 8(b) (1) (B).

Upon the entire record, and after due consideration of the briefs filed by General Counsel and each of the Respondents, and of the "Statement" filed on behalf of the Charging Party, I make the following:

<sup>&</sup>lt;sup>1</sup> Including documents submitted after the hearing, which are hereby admitted as G.C. Exhs. 22, 23, and 24, and Local 134's Exhs. 14A through I and 15A and B, respectively.

<sup>&</sup>lt;sup>2</sup> Respondents' motion to strike a phrase from Charging Party's Statement as "scandalous and/ or impertinent" is granted as Charging Party consented thereto.

# FINDINGS OF FACT

## I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATIONS INVOLVED

Illinois Bell Telephone Company, herein called the Company, an Illinois corporation with headquarters in Chicago, renders local and long distance telephone service as part of a nationwide telephone system, and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent Local 134, International Brotherhood of Electrical Workers, AFL-CIO, herein called the Local or the Union, and its parent organization, the Respondent International, are labor organizations within the meaning of Section 2(5) of the Act.

## II. THE UNFAIR LABOR PRACTICES

# A. Background and Chronology

For many years, long antedating any Federal labor legislation, the Company (or its predecessor) and the Local have had contractual relations, pursuant to which the Local represented the Company's Chicago employees for purposes of collective bargaining. The bargaining unit embraced employees in the "Plant Department," and included, inter alia, not only journeymen and apprentices engaged as P.B.X. installers but also persons employed as "P.B.X. Installation Foremen," "Building Cable Foremen," "Test Center Foremen," and "General Foremen," The powers and duties of these "foremen" and the question whether they are "supervisors" within the meaning of the Act are among the litigated issues in this case. The contract provides that all members of the bargaining unit must become and remain members of the Local. As recently as 1959 the contracts in effect between the Local and the Company prescribed monthly wage rates for the various "foremen" listed above. Since May 1959 the contracts did not provide wage rates for those foremen, but did contain a section headed "Working Conditions for General Foremen and Foremen." This provision concerned payment for overtime work and for certain absences, and contained a clause stating that an appointment as general foremen could not be made for a period of less than 5 days. Other provisions of the contract, such as, for example, that dealing with vacations, appear applicable to the foremen as well as to journeymen em-

ployees."

Between May 8, 1968, and September 20, 1968, the Local was engaged in an economic strike against the Employer. At the inception of the strike the Company informed the foremen referred to above that the Company would like to have them come to work, but that the decision whether to work or to respect the strike was a matter left to the discretion of each individual foreman, and that those who refrained from working during the strike could resume work when it ended without being penalized. The Local held a meeting just before the strike at which the foremen were advised that they would be subject to union discipline if they performed rank-and-file work during the strike. A number of foremen thereupon retained counsel and formed an association (the Charging Party, hereinafter referred to as the Association) to protect foremen who worked during the strike.

During the course of the strike some of the foremen performed rank-and-file work, and some stayed out of work. After the strike the Company in no way discriminated against the latter group, and indeed promoted some of them to higher positions. The Local conducted proceedings against a number of foremen, and imposed fines of \$500 on foremen who performed rank-and-file work during the strike and of \$1000 each against the five foremen who were instrumental in forming the Association. Most of the fined foremen appealed to the International. which in most instances sustained the action of the Local. During the intraunion proceedings, counsel for the Association assisted the foremen in their defense, in which the accused foremen urged that they were supervisors, that the strike was not in their behalf, that the Local was not seeking to bargain for them, and that the union security clause which compelled their membership in the Local was illegal.

The Local has commenced suit in the Illinois courts to

collect some of the fines. Insofar as any of the foremen have paid any part of the fines, the Company has reimbursed them.

B. The Status of the Foremen as "Supervisors" Within the Meaning of the Act, and Their Powers With Respect to the Adjustment of Grievances

As noted above, most of the foremen involved in this case were employed as P.B.X. installation foremen, or in work of similar character such as building cable foremen, or general foremen. The record establishes that such foremen were in charge of crews of from 8 to 12 men, that they had power to grant time off to their men, that they scheduled overtime, selected the men who would work overtime, disciplined for tardiness by suspending men or docking their pay, and effectively recommended men for promotion or discharge. Although the Union argues that the testimony establishing these powers was of a vague and general nature, it called no witnesses to deny that the foremen possessed the powers which the company representatives, called as General Counsel's witnesses, ascribed to them.3 On this record I find that the foremen in question possessed one or more of the powers set forth in Section 2(11) of the Act and are supervisors within the meaning of the Act. See, e.g., N.L.R.B. v. Henry Colder Co., 416 F.2d 750, 754, fn. 3 (C.A. 7, 1969).

As to the authority of these foremen to adjust grievances, the contract recites with respect to the grievance procedure that "The employee or his Steward shall first bring the grievance to his Foreman, or other first line supervisor," and that "If the grievance is not settled, it shall then be taken up with the succeeding appropriate

<sup>&</sup>lt;sup>3</sup> General Counsel expressed a readiness to interrogate individual foremen as to their powers and duties. The Trial Examiner prevented him from doing so on the ground that such testimony would be cumulative, but expressly invited counsel for the Local to cross-examine such foremen on that issue, and also to put on testimony on that issue as part of Respondent's case. No such cross-examination was attempted and the Local adduced no testimony on this issue as part of its case.

levels of supervision . . . . " The contract thus unequivocally provides that the foremen here in question may adjust grievances. Moreover, the testimony adduced by General Counsel establishes that the foremen may adjust grievances arising out of disputes over whether an employee should be paid for certain hours he worked after checking out, or over working conditions (such as excessively cold air-conditioning), or over disciplinary action taken by the foreman, or over overtime allocations he had made. Indeed, the testimony shows that most of the grievances are adjusted informally by the foremen, either by their making the requested adjustment or by their persuading the union representative that the grievance lacks merit. Manifestly, these matters are usually of minor importance, and major issues go on to later stages of the grievance procedure. Nevertheless, I am satisfied on this record that the foremen in question do have power to adjust, and do adjust, grievances. Again the Union's suggestion that the testimony is vague and general is unavailing in the light of the contractual language and the Union's failure to adduce testimony which would diminish the force of the evidence presented by General Counsel.

The foregoing discussion of the powers and duties of the foremen is applicable to all those named in the complaint as having been fined except for three men identified in the complaint as "assistant staff supervisor," and two identified as "engineer." The record establishes that an "engineer" has no supervisory authority and that an "assistant staff supervisor" has no occasion to participate in the adjustment of grievances, and normally has no people working for him. The record further establishes that it is a common practice for the Company to transfer a man from a job as P.B.X. foreman to that of engineer and back again, and that "assistant staff supervisors" are selected from the ranks of P.B.X. foremen, serve 1 or 2 years as assistant staff supervisors, and then either return to their jobs as P.B.X. foremen or are promoted to district installation superintendents (a supervisory position with power to adjust grievances). C. Board Decisions Concerning a Union's Power To Fine Supervisory Employees

A series of recent Board decisions, several of which are now awaiting judicial review, hold that under the circumstances there presented a labor organization violates Section 8(b) (1) (B) of the Act (i.e., restrains or coerces an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances) when it fines supervisory employees who are union members. Insofar as Respondents attack the validity of any or all of these holdings. I must, of course, refer them to higher authority, administrative and judicial, as I am required to follow these precedents in the present state of the law. Insofar as Respondents urge that the instant case is distinguishable, however, it becomes important to set forth, as I understand it, what the Board has heretofore held in this area.

The lead case apparently is San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.), 172 NLRB No. 252. In that case the union fined certain foremen-members because of alleged violations of the contract between the employer and the union. The union also threatened similar action against foremen as a result of "disagreements involving contract interpretations or grievance adjustment." The Board's finding of violation in that case sheds little light on the problem here, for in that case the conduct for which the foremen were fined was directly related to their role as the employer's representative in the adjustment of grievances and in collective bargaining (which includes, of course, the administration of the contract: see Conleu v. Gibson. 355 U.S. 41, 46).

<sup>4</sup> There, as here, the contract required the foremen to be members of the union.

<sup>&</sup>lt;sup>5</sup> The Board in the Oakland Mailers case and in several subsequent cases distinguished N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, on which Respondents place their principal reliance. The Board appears to be of the view that the fining of supervisors stands on an entirely different footing from the fining of rank-andfile members. I note that counsel for the International suggests that I not follow Blackhawk Tanning Co., Inc., 178 NLRB No. 25,

The next case in this area to come before the Board was Toledo Locals Nos. 15-P and 272 of the Lithographers and Photoengravers International Union, AFL-CIO (The Toledo Blade Company, Inc.), 175 NLRB No. 173. In that case, as here, the foremen involved were required to be members of the union which fined them. The fines in that case were imposed for alleged viola tions of the contract, in that the supervisors worked on production during a strike, thereby violating two contractual provisions, one limiting the amount of production a supervisor can do, and the other prescribing a minimum crew before any work can be performed. The Board in that case held that the union by imposing the fines violated Section 8(b) (1) (B). The case may be distinguishable from that now before us, for although in both cases the supervisors worked while their union was out on strike, the basis of the Board's holding in the Toledo case appears to be that the supervisors were involved in what their union claimed to be violations of the contract, and no such contention is urged here.

The third case in this area to reach the Board was New Mexico District Council of Carpenters and Joiners of America; United Brotherhood of Carpenters and Joiners of America (A. S. Horner, Inc.), 176 NLRB No. 105. In this case one Wilson, a supervisor and a union member, signed a letter, also signed by the company president, urging the employees to vote against the union in a representation election. The Board held that by imposing a fine on him for this conduct the union violated Section 8(b)(1)(B). Manifestly Wilson's act in urging the employees to vote against the union was not itself directly related to contract interpretation, the adjustment of grievances, or any subject of collective bargaining. However, the Trial Examiner's decision, adopted

by the Board, states:

because the decision was by a 3-2 majority and "As a realistic matter, it must be recognized that one of the members joining in the 'lead' opinion is no longer on the Board and that the term of the other will be up in two months." I decline to engage in the speculation of counsel, but I call his attention to the dangerous consequences of his thinking as applied to this case, for only two members of the 5-4 majority in Allis-Chalmers are still on the Court.

By preferring the charges and imposing a fine upon Wilson, Respondents were attempting to force the Company to change its selected representative for the purposes of collective bargaining and the adjustment of grievances from a representative of management's viewpoint to a person subservient to the will of Respondents. The Council itself explained it was fining or bringing charges against Wilson because he placed the Company's interests above those of Respondents. Sizemore in his letter to the General Executive Board of the United Brotherhood stated that Superintendent Wilson's loyalty "must be to the Union." It is clear that Respondents preferred charges against and fined Wilson as a means of disciplining him because he placed the interests of the Company above those of Respondents. This was obviously coercion against the Company because it would tend to require the Company to retain as representatives for collective bargaining and adjustment of grievances only individuals who were subservient to Respondents. That the Company and Respondents had no labor agreement does not detract from this finding. Wilson could and did adjust grievances. Respondents were forbidden by the Act to dictate to the Company whom it should select to adjust employee grievances. Respondents' actions "were designed to change the [Company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondents' will. In enacting Section 8(b)(1) (B) Congress sought to prevent the very evil involved herein-union interference with an employer's control over its own representatives. [Citation] That Respondent[s] may have sought the substitution of attitudes rather than persons, and may have exerted [their] pressure upon the [Company] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [Company's] control over its representatives. Realistically, the [Company] would have to replace its [superintendents] of

face de facto nonrepresentation by them." San Francisco-Oakland Mailers' Union No. 18, 172 NLRB No. 252.

By fining Wilson, Respondents did so because he chose to act as a management representative, which he was.

In a subsequent case involving the same employer and the same union, reported at 177 NLRB No. 76, the Board again found a violation of Section 8(b)(1)(B). In this case the union fined a supervisor for continuing to work for an employer who was not under contract with the union. This case is plainly distinguishable from that before us, as the union's position in the second *Horner* case was that the supervisor must leave his employment

altogether.

Likewise distinguishable is still another New Mexico case, Sheet Metal Workers' International Association, Local Union 49, AFL-CIO (General Metal Products, Inc.), 178 NLRB No. 24, where the Board found a violation of Section 8(b) (1) (B) in the union's fining of a supervisor for performing work in violation of the contract between the union and the employer. The holding in that case that the union "attempted by its internal disciplinary procedure to circumvent the contractual procedures for settlement between the parties of a contractual grievance" does not apply to the instant case. Similarly two recent Board holdings in this area, Dallas Mailers Union, Local No. 143, and International Mailers Union (Dow Jones Co.), 181 NLRB No. 49, and Houston Typographical Union No. 87 (Houston Shopping News Co.), 182 NLRB No. 91, are distinguishable. In the Dallas case the union expelled a supervisor because of an order he gave a nonsupervisory employee, which the latter charged was discriminatory and improperly motivated. Manifestly, the supervisor was exercising his supervisory authority, and as the Board stated, "His expulsion will also be a clear signal to other foremen, who are, under the established practice, members of the Union, that they could be subject to similar discipline if they administer the contract in a manner so as to incur the Union's displeasure." In

the *Houston* case the union fined a supervisor-member for what it regarded as his failure to observe hiring procedures required under the contract. The fine, in the Board's view, was designed to make the supervisor "more amenable to [the union's] interpretation of how the contract should be applied . . . ." The rationale in the *Dallas* 

and Houston cases has no application here.

Finally, in Local Union No. 453, Brotherhood of Painters, etc. (Syd Gough & Sons, Inc.), 183 NLRB No. 24, the Board affirmed Trial Examiner Sherman's dismissal of a complaint which alleged that a union violated Section 8(b)(1)(B) by fining a supervisor for working at a particular jobsite without notice to the union. Trial Examiner in that case noted that the only purpose of the "notice" requirement was to facilitate the union's administration of its hiring hall and the collection of certain assessments. He concluded that "unless the Board is prepared to say that the fining of a supervisor by a union for whatever reason, including, for example, late payment of dues or disruption of a union meeting, tends to impair his effectiveness as an employer representative. it is not clear how the fine imposed . . . for alleged noncompliance with Respondent's registration requirement may be held to violate Section 8(b) (1) (B)." The Board in affirming the dismissal did not pass upon the Trial Examiner's analysis of the other cases in this area but contented itself with rejecting, as unsupported by the evidence, General Counsel's contention in that case that the union's motivation was to retaliate against the employer for the latter's filing of charges against the union. So far as here relevant the Gough case appears to stand for the proposition that the mere fining of a supervisor does not establish a per se violation of the Act.

# D. Conclusions With Respect to the Legality of the Fines

As the discussion in the foregoing section indicates, most of the Board's holdings in this area concern discipline which a union directed at supervisory employees because of action by the supervisor directly related to matters of contract construction or the discharge of su-

pervisory functions. Those cases are readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b) (1) (B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in "collective bargaining or the adjustment of grievances," to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself had made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in fining the superivsors who worked, or even in finding that the Union's action had any natural or inherent tendency to restrain or coerce the Company. (Undoubtedly the fines tended to restrain or coerce the supervisors, but that is not the violation charged. Also, it is no part of this case to decide whether the fines were lawful or proper under the Union's constitution or under any provision of statute or common law other than Section 8(b) (1) (B) of this Act.)

The Board in the first Horner case (176 NLRB No. 105), however, did not limit the scope of Section 8(b) (1)(B) along the lines I have indicated. In that case the supervisor was fined because he signed a letter urging the employees to vote against the union. Such conduct on his part bore no discernible relationship to his role as a representative of management in collective bargaining or the adjustment of grievances. Indeed, the conduct of the supervisors in the instant case in working during the strike seems far more directly related to furthering

the legitimate aims of management, and far more directly related to the normal obligations of a supervisor, than the conduct of the supervisor in *Horner*. But the Board in that case found that the union by fining the supervisor violated Section 8(b)(1)(B), adopting without comment the Trial Examiner's observations quoted above. The respect which I am compelled to pay the Board's holding in that case requires me to find a similar violation here. See St. Louis Typographical Union No. 8 (Graphic Arts Assn. of St. Louis), 149 NLRB 750, 758-759.

What has been said above deals with the fines for performing work during the strike. Five men were fined for organizing the Bell Supervisors Protective Association. They undertook this action "on their own," and it did not directly redound to the benefit of the Company. It may well be argued that to find a violation of Section 8(b) (1) (B) in these five instances is to go even beyond the first Horner case, where the supervisor affixed his signature to a letter also signed by a company official, and urged employees to reject a union with which the company might have had to bargain. Not even Horner goes so far as to hold that any fine a union imposed on a supervisor violates Section 8(b) (1) (B), and the recent Gough decision appears to foreclose any such argument. If, to use the hypothetical case I suggested at the hearing, the union fined supervisors for resigning from the union's bowling league and forming one of their own, I would have some difficulty in discerning an infringement of the protection the statute gives employers in Section 8(b) (1) (B). In the actual case before us, however, the Bell Supervisors Protective Association arose out of relations among the supervisors, the Company, and the Union, and not (as in the bowling example) out of relations solely between the supervisors and the Union. The Association was formed because the Union threatened to fine supervisors for working during the strike, and to protect or aid those who desired to work. As the Association had its inception as a response to what is here found to be illegal union conduct, it is not unreasonable to extend the finding of illegality to cover the

Union's fines relating to the Association. Although the Company was not a party to the creation of the Association, the relationship of the supervisors to the Company underlies the creation of the Association just as it underlies the action of the supervisors in working during the strike. To separate the two sets of fines would be highly legalistic and unrealistic, a practice on which the Board has properly frowned on past occasions, prefering to treat situations "as a whole." See, e.g., Curtis Mathes Mfg. Co., 145 NLRB 473, 475-476 overruling the finding at 482; Pittsburgh Reflector Company, 177 NLRB No. 57. Moreover, as I understand the hospitable scope which the Board gave Section 8(b) (1) (B) in the first Horner case, a union violates that section when it fines a supervisor for any conduct in which the supervisor engages which tends to further the interests of the employer.6 Here the Association tended to further the Employer's interest by helping protect supervisors who desired to work during the strike.

There remains for consideration the case of the five men (two engineers and three assistant staff supervisors) who apparently had been and would again be in the supervisory category but who were removed therefromperhaps for as long as 1 or 2 years—and were not "supervisors" at the time the Union fined them (and presumably at the time of the strike) and had nothing whatsoever to do with "collective bargaining or the adjustment of grievances." General Counsel relies on the language approved by the Board in Toledo Blade, supra, finding a violation when the person disciplined was merely a "natural, possible, future choice of the employer to handle its grievances as occasion might arise. . . ." But in that case those words were applied to a supervisor who had "present substantial other supervisory authority and regular contact with the employees under him . . . . " The Company may well feel that it desires to reimburse these nonsupervisors who were fined by the Union, and the legality of the fines may be questioned in other pro-

<sup>&</sup>lt;sup>6</sup> The narrow holding in the *Gough* case falls within this generalization, as the supervisor's failure to register was in no sense in the employer's interest.

ceedings and on other grounds. On the narrow issue before me, however, I cannot find any restraint or coercion of the Company in its selection of representatives for collective bargaining or adjustment of grievances in the Union's fining of nonsupervisors who are not concerned with those subjects. To be sure, if they are thereafter returned to supervisory positions with power to adjust grievances they will have felt the force of the Union's authority. The same, of course, would be true of any employee who had been fined by the Union and later achieved supervisory status. But, under the views heretofore expressed, the supervisors would be protected against union fines for strikebreaking as supervisors, and I see no need, so far as the statutory purposes are concerned, to extend the protection at other times. In any event I find that the Union is not violating Section 8(b) (1) (B) insofar as it fines persons who are not, at the time of the conduct for which they are fined, supervisory employees, and are not, and in their then existing jobs cannot be, engaged in collective bargaining or in the adjustment of grievances. The first Horner case may require me to stretch the statute beyond what I would otherwise consider the breaking point, but it hardly justifies ignoring the statute altogether.

Finally, insofar as a vice president of the International or its president affirmed the action of the Local in imposing fines heretofore found to have been illegally levied, the International ratified the action of the Local, and therefore likewise violated Section 8(b)(1)(B). This result follows even in those cases where the International did not pass on the merits but found the appeal procedurally deficient, for the International should have held all the fines to be illegally imposed. As the record shows

<sup>&</sup>lt;sup>7</sup> I am aware of the general rule, as stated at 74 A.L.R.2d 783 at 800, that "where the only action taken by the national union was in the nature of an appellate review of the local's action, the national union has been held not answerable in damages to a wrongfully suspended or expelled member." In my judgment this general principal should not govern a case where the International, by its review, sustains a fine imposed in violation of a Federal law after the validity of that fine under that law is placed in issue before it.

that the International has not collected or attempted to collect any fines, its liability to reimburse the fined employees should be considered secondary to that of the primary violator, the Local. *Makela Welding*, *Inc.*, 159 NLRB 964, 973, enfd. 387 F.2d 40 (C.A. 6, 1968); see also the *Lexington Electric* case there cited.

## E. Procedural Rulings

The Local subpensed certain records of the Association and certain notes or memoranda from the Company. I granted motions to revoke both subpense for reasons set forth in the transcript and the pertinent exhibits

and I see no need to repeat those reasons here.

At the conclusion of the hearing the Charging Party filed a document entitled a motion "for Amendment to Conform Pleadings to Proof with Respect to the Union Shop Contract Proved in this Case." Counsel for the Charging Party disclaimed any power on its part to amend the complaint, but pointed out that such power resides in the Trial Examiner and in the Board, citing Frito Company v. N.L.R.B., 330 F.2d 458 (C.A. 9, 1964). The avowed purpose of the amendment was to challenge the legality of the contract between the Company and the Local on the ground that the unit is inappropriate because it includes supervisors, and that the union-security clause is therefore illegal for failure to meet the requirement of Section 8(a)(3)(i). This was the precise contention advanced by the same Charging Party in Case 13-CA-8451, in which the General Counsel sustained the refusal of the Regional Director to issue a complaint. In a posthearing memorandum in support of the Motion, the Charging Party pointed out that all the facts necessary to sustain its allegation (the provisions of the contract and the supervisory status of the foremen included in the unit) were established on this record.

I denied the motion to amend. Most of the cases relied on in support of the motion present the situation in which all parties were on notice throughout the litigation of all the facts alleged to constitute a violation of law, but the complaint failed to allege violations of all the proper subsections of the Act. Here the amendment offered by the Charging Party would of necessity add factual allegations to the complaint as well as new subsections to the list of those violated. The *Frito* case holds only that the Trial Examiner and the Board have statutory *power* to consider the validity of contractual provisions fully litigated although not alleged as violative of the Act; the case does

not hold that the Board is compelled to do so.

In the instant case, assuming the existence of power to pass on the issue tendered by the Charging Party at the close of the hearing. I think it inadvisable to do so. Among other considerations. I note that the effect of sustaining the Charging Party's position would be to invalidate a contract of many years' standing without any notice to either of the contracting parties, until the conclusion of the hearing, that the validity of their agreement was in issue. Cf. Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 232-235. I also note that the condition which the Charging Party urges is illegal (a union-security agreement in a bargaining unit which includes supervisory and nonsupervisory employees) has apparently been characteristic of several cases recently before the Board, without any intimation from that agency that it finds anything irregular in such a situation. I doubt the wisdom of deciding so far reaching a question which enters this litigation only by the back door, as it were.

The Charging Party is, of course, free to assign this ruling as error and to pursue it before the Board. I would respectfully suggest that if the Board is disposed to consider the matter on its merits, the other parties (Union, Company, and General Counsel) should be invited to submit supplementary briefs thereon. I would also assume that if the Board affirms my denial of the motion and the Charging Party presses the issue on judicial review, the court if it found procedural merit in the Charging Party's position would remand the issue to the Board to ascertain its substantive views. Cf. Laclede Gas Co. v. N.L.R.B., 421 F.2d 610, 617 (C.A. 8, 1970).

### CONCLUSIONS OF LAW

1. Persons employed by the Company as general foremen, P.B.X. installation foremen, test center foremen, building cable foremen, or district installation superintendents are supervisors within the meaning of Section 2(11) of the Act.

2. Persons employed by the Company as engineers or as assistant staff supervisors are not supervisors within

the meaning of the Act.

3. By fining supervisors, as described in the first conclusion of law stated above, for engaging in productive work during the strike or for forming the Bell Supervisors Protective Association, Respondent Local engaged in an unfair labor practice affecting commerce within the meaning of Sections 8(b)(1)(B) and 2(6)(7) of the Act.

4. Respondent International, insofar as it, acting through any of its officers, sustained the fines described in the preceding conclusion of law, engaged in the same unfair labor practice.

## THE REMEDY

I shall recommend that Respondents cease and desist from their unlawful conduct, and that they make the unlawfully fined supervisors whole by rescinding the fines, expunging all records thereof, and refunding to the Company (which has already reimbursed the supervisors) the amount of the fines they have paid. The monetary liability for refunding the fines shall fall in the first instance on the Local, with secondary liability on the International. I shall further recommend the posting of a notice signed by officers of both Respondents.

Accordingly, upon the foregoing findings and conclusions, and upon the entire record in the case, I recommend, pursuant to Section 10(c) of the Act, issuance of

the following:

### ORDER 8

Respondents International Brotherhood of Electrical Workers, AFL-CIO, and its affiliated Local 134, and their respective officers, agents, and representatives shall:

### 1. Cease and desist from:

(a) Fining supervisory employees of the Illinois Bell Telephone Company, whose duties include representing that Company in collective bargaining or in the adjustment of grievances, for engaging in productive work during the course of a strike or for activities directly related thereto such as forming or participating in an organization designed to protect supervisors who work during a strike.

(b) In any like or related manner restraining or coercing the aforesaid Employer in the selection of his representatives for the purposes of collective bargaining or the

adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind, and expunge all records of, the fines levied against supervisory employees for having engaged in productive work during the 1968 strike or for having participated in the formation of the Bell Supervisors Protective Association.

(b) Reimburse the Illinois Bell Telephone Company for any and all sums paid by it pursuant to the fines referred to in the preceding paragraph, and advise in writing each employee against whom such fines were levied that the fines have been rescinded, that the records thereof have been expunged and that the Company has been reimbursed; provided: that the action required in this subparagraph shall be primarily required of the Re-

<sup>&</sup>lt;sup>8</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

spondent Local, and shall be required of Respondent International only to the extent that Respondent Local shall fail to give the written notices and pay the sums herein

required.

(c) Post at its business offices, meeting halls, and all other places where notices to members of the Local are customarily posted, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 13, shall, after being duly signed by representatives of the Respondents, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 13 signed copies of said notice for posting by Illinois Bell Telephone Company, if willing, in places where notices to employees are customarily posted. Copies of said notices, on forms provided by the Regional Director, shall, after being signed by the Respondents, be forthwith returned to the Regional Director for disposition by him.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order, what steps they have taken to comply herewith.<sup>10</sup>

<sup>&</sup>lt;sup>9</sup> In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

<sup>&</sup>lt;sup>10</sup> In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Local Union No. 2150, International Brotherhood of Electrical Workers, AFL-CIO and Wisconsin Electric Power Company. Case 30-CB-293

July 14, 1971

## DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING, JENKINS, AND KENNEDY

On May 6, 1970, Trial Examiner Henry L. Jalette issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent, Charging Party, and General Counsel filed exceptions to the Decision and supporting briefs. The Respondent has also filed an answering brief to the General Counsel's and Charging Party's exceptions.

On September 2, 1970, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations act, as amended, ordered that this case be consolidated with one other 1 for the purpose of oral argument before the Board. Oral argu-

ment was heard on October 5, 1970.

The Board <sup>2</sup> has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's

¹ International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company), 192 NLRB No. 17, issued this date.

<sup>&</sup>lt;sup>2</sup> Member Ralph E. Kennedy, who succeeded to the Board after the oral argument presented by the parties, has reviewed the entire record in this case including the arguments advanced during oral argument, and is participating in the disposition of this case.

Decision, the exceptions and briefs, the oral arguments, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent with our Decision and Order.

The Charging Party, hereinafter referred to as WEP-CO, had recognized and negotiated with the Respondent as the bargaining representative of its employees since the 1930's. The collective-bargaining agreements, including the most recent negotiated by the parties provide in pertinent part that an employee promoted to a supervisory position may, upon request, be given a withdrawal card by the Respondent. The supervisor can request either a participating or an honorary withdrawal card. With the possession of either type of withdrawal card he continues, according to the International Brotherhood of Electrical Workers' Constitution, to be treated as a union member subject to the provisions of the constitution but he is not required to pay dues. The only benefit of an honorary withdrawal card is the right of the holder to be restored to regular membership without fulfilling any of the normal reinstatement requirements. The participating withdrawal cardholder, besides possessing the benefits of an honorary cardholder, is entitled to participate in the Union's pension and insurance benefits.

Between Jun 16, 1969, and July 1, 1969, Respondent engaged in an economic strike against WEPCO. Although not clear from the record, WEPCO's counsel, during oral argument, asserted that WEPCO directed that its supervisors report to work during the strike. It is clear from the record that substantially all of WEPCO's supervisors reported for work during the strike and performed struck work normally performed by rank-and-file employees represented by the Respondent. The parties stipulated that the supervisors involved herein performed struck work.

On August 14, 1969, Respondent notified the supervisors involved herein that they had been charged with "doing struck work of Local 2150." All but two of the charged supervisors were holders of withdrawal cards obtained under the terms of the collective-bargaining agreement. Trials were held but none of the charged

individuals appeared. All but two were found guilty of violating the Union's Constitution, and accordingly fined \$100 and suspended from membership for a year, with sentence to be suspended if they were not found guilty of a similar offense for a period of 2 years.<sup>3</sup>

The parties stipulated that 60 of the 61 individuals notified of charges and/or fined are supervisors and that 19 of those 60 supervisors have the authority to adjust grievances. The Trial Examiner, and we agree for the reasons set forth in the Trial Examiner's Decision, found the remaining 41 supervisors also possess the authority to adjust grievances and are representatives of the Employer within the meaning of Section 8(b) (1) (B).

The Trial Examiner concluded that the fining of the supervisors for crossing a picket line and doing struck work violated Section 8(b) (1) (B) of the Act. He rea-

<sup>3</sup> The Union mistakenly fined three supervisors. McMahon, while a member of the Union, was in the hospital at the time of the strike and therefore could not, as charged in the union proceedings, perform the struck work. Both Miller and Gardner were not members of the Union at the time of the strike. Eventually the Union dropped charges against these supervisors. However, at least one of the supervisors, Miller, was seriously inconvenienced since he was actually fined and forced to make a formal appeal to the International to vindicate his position. The Trial Examiner concluded that the actions against these supervisors were the result of a mistake and since this problem is "outside the mainstream of this case" this portion of the complaint should be dismissed. We disagree. The fact that the Union brought charges of misconduct against these supervisors is sufficient to warrant the finding, of a violation. Cf. Granite State Joint Board, Local 1029, AFL-CIO (International Paper Machine Company), 187 NLRB No. 90.

<sup>&</sup>lt;sup>4</sup> The General Counsel and the Charging Party have excepted to the Trial Examiner's finding that the safety specialist was not an employer representative for the purposes of collective bargaining and grievance adjustment. We agree with the Trial Examiner that the safety specialist, who is not clearly a statutory supervisor and is not empowered to settle grievances and has no direct and immediate likelihood of occupying such a position of authority where he might exercise such power, is not within the coverage of Section 8(b)(1)(B). In this regard, we follow the reasoning set forth in Toledo Locals Nos. 15-P and 272 of the Lithographers and Photoengravers International Union, AFL-CIO (The Toledo Blade Company, Inc.), 175 NLRB No. 173, enfd. 437 F.2d 55 (C.A. 6).

soned that whenever the dispute can be characterized as a dispute between the employer and the union rather than between the union and its members, any union disciplinary action against a supervisor who may act on behalf of the employer in grievance adjustment is violative of Section 8(b) (1) (B) of the Act. We agree.

In the Toledo Blade case, the Board adopted the following summary of the general principle of law established

by Section 8(b) (1) (B):

The Board's decision in the San Francisco Mailers case, underscores the . . . import of Section 8(b) (1)(B) as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of thir employers. As the Board held, such discipline by a union, even though the employer may have consented to the compulsory union membership of the supervisor under a union-security clause, is an unwarranted "interference with [the] employer's control over its own representatives," and deprives the employer of the undivided loyalty of the supervisor to which it is entitled.

Applying those long-settled and court-approved principles to this case 5 leads to the conclusion that Respondent

<sup>&</sup>lt;sup>5</sup> See, e.g., Meat Cutters Union Local 81 (Safeway Stores, Inc.), 185 NLRB No. 130; Freight, Construction, General Drivers, Warehousemen and Helpers Union, Local 287, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Grinnell Co. of the Pacific), 183 NLRB No. 49; Local Union No. 453, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (Syd Gough and Sons, Inc.), 183 NLRB No. 24, Houston Typographical Union No. 87 (Houston Shopping News Company), 182 NLRB No. 91; Dallas Mailers Union, Local No. 143, and International Mailers Union (Dow Jones Co., Inc.), 181 NLRB No. 49; Sheet Metal Workers' International Association, Local Union 49, AFL-CIO (General Metal Products Inc.), 178 NLRB No. 24, enfd. 430 F.2d 1348 (C.A. 10); New Mexico District Council of Carpenters and Joiners of America; United Brotherhood of Carpenters and Joiners of America (A. S. Horner, Inc.), 177 NLRB No. 76: New Mexico District Council of Carpenters and Joiners of America: United Brotherhood of Carpenters and Joiners of America (A. S. Horner, Inc.), 176 NLRB No. 105; Toleda Locals Nos. 15-P and 272 of the Lithographers and Photoengravers International

violated Section 8(b) (1) (B) when it fined the supervisors for performing work which the Employer had directed them to perform. Here, the supervisors, by doing struck work, as directed by the Employer, were furthering the interests of the Employer in a dispute not between the Union and the supervisor-union members but between the Employer and the Union. During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.

Of course, our decision is not meant to imply that a union is completely precluded from disciplining supervisor-union members. It only means that when the underlying dispute is between the employer and the union rather than between the union and the supervisor, then the union is precluded in taking disciplinary action by Section 8(b)(1)(B). The intent is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position casts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective-bargaining and grievance adjustment representative. The purpose of Section 8(b)

Union, AFL-CIO (The Toledo Blade Company, Inc.), 175 NLRB No. 173, enfd. 437 F.2d 55 (C.A. 6); San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.), 172 NLRB No. 252.

(1) (B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. Accordingly, we find that Section 8(b) (1) (B) has been violated.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Local Union No. 2150, International Brotherhood of Electrical Workers, AFL-CIO, its officers, agents, and representatives shall take the action set forth in the Trial Examiner's Recommended Order.

# MEMBER FANNING, dissenting:

During a strike called by Respondent Union, the Employer directed its supervisors to perform the work of the striking employees. Many of its supervisors were members of the Union under a contractual provision initially proposed by the Employer which gave them the option of remaining union members when they advanced to supervisory positions.<sup>5</sup> Membership in the Union is of

<sup>&</sup>lt;sup>6</sup> The General Counsel has excepted to the Trial Examiner's refusal to insure that the Notice to Members be read at two of the Local 2150's parcel membership meetings. We see no reason in this case for requiring such an extraordinary remedy.

 $<sup>^7</sup>$  In fn. 11 of the Trial Examiner's Decision change "10" to "20" days.

<sup>&</sup>lt;sup>8</sup> There is an obvious benefit to management in such a provision in that it permits recruitment of supervisors from the ranks of highly qualified production employees who might be reluctant to accept promotion if it meant cutting off all ties and associations with their union and the loss of benefits flowing from their membership. Among the benfits retained by supervisors who elect to take a withdrawal card are the right to continued participation in pension and

considerable benefit to the individual supervisors, but, as members, they remained bound to discharge the obligations of membership and are subject to union discipline for failure to faithfully discharge such obligations. By performing production work during the strike, the supervisors violated the Union's rule against performing struck work, and they were fined for such transgression.

As in *Illinois Bell Telephone Company*, 192 NLRB No. 17, my colleagues find that the Union violated the prohibition contained in Section 8(b)(1)(B) against restraint or coercion of an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances. For the reasons that led me to dissent in *Illinois Bell*, I dissent herein. While it serves no useful purpose to repeat those reasons here, one aspect of the case seems to me to highlight a basic

weakness in my colleagues' approach.

Section 8(b) (1) (B) proscribes restraint or coercion of the employer in his selection of representatives who adjust grievances. Here, of course, the Employer was in no way restrained or coerced in his selection of such representatives, indeed it took the initiative in enabling them to remain union members. Nevertheless, had the Union restrained or coerced those representatives in the performance of their grievance-adjustment functions, the Employer would then have been denied the unrestrained and uncoerced performance for which he had selected them, and a violation of Section 8(b) (1) (B) could properly be found. But their performance of such functions is not involved herein, for the Employer directed them to perform nonsupervisory production work during the strike. I do not see how the restraints imposed on the supervisors for performing such work translate into restraint and coercion of the Employer in his selection of representatives for the purpose of settling grievances.

insurance programs and the right to restoration to regular membership status without payment of reinstatement fees upon their return to employee status.

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

#### No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134, International Brother-HOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

#### No. 71-1785

BELL SUPERVISORS PROTECTIVE ASSOCIATION (NOT A LABOR ORGANIZATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

#### STIPULATION

Pursuant to the Rules of this Court, the parties, subject to the Court's approval, hereby stipulate and agree as follows:

### IV. SUBSTANTIVE STIPULATIONS

B. Illinois Bell Telephone Company or its predecessors have maintained a contractual relationship with Local 134, I.B.E.W. since 1909. Since 1948 these contracts have remained unchanged, so far as relevant to the issues of this case, with respect to the scope of the bar-

gaining unit (Art. II, Sec. 1(a)) and union security (Art. III, Sec. 1).

Dated at Washington, D.C. this 8th day of October, 1971.

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS
BOARD

Dated at this 8th day of October, 1971.

/s/ Laurence J. Cohen LAURENCE J. COHEN Counsel for Petitioner

Dated at this 12th day of October, 1971.

/s/ Robert E. Fitzgerald ROBERT E. FITZGERALD Counsel for Petitioner

Dated at ...... this 13th day of October, 1971.

/s/ George B. Christensen
(D.M.K.)

GEORGE B. CHRISTENSEN Counsel for Petitioner

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## SEPTEMBER TERM, 1972

#### No. 71-1559

[Filed Feb. 9, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk] INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

AFL-CIO, and Local 134, International Brother-HOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before: BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges.

#### ORDER

It is ORDERED by the court, sua sponte, that the parties, on or before February 14, 1973, supplement the record in this court with any evidence before the National Labor Relations Board indicating the following:

- 1. The bargaining agreement between Local 134, International Brotherhood of Electrical Workers and Illinois Bell Telephone Company.
- The membership status (active or on withdrawal cards) of the supervisors who are members of the union.
- 3. Any union pension or death benefit plans in which supervisors were permitted to or did participate.

Per Curiam
For the Court

/s/ Hugh E. Kline Hugh E. Kline Clerk

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559

[Rec'd. 2/15/73]

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134, INTERNATIONAL BROTHER-HOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

# RESPONSE OF THE PARTIES TO THE COURT'S ORDER OF FEBRUARY 9, 1973

On February 9, 1973, the Court directed the parties to the above-captioned proceeding to supplement the record in this Court with any evidence before the National Labor Relations Board concerning (1) Local 134's collective bargaining agreement with the Company, (2) the membership status of the supervisors who belonged to the Unions, and (3) the benefit plans which were open to or participated in by the aforementioned supervisors. In accordance with the Court's order the parties herewith submit the following:

1. Enclosed are copies of the applicable collective bargaining agreements between Local 134 and the Company, General Counsel's Exhibits Nos. 7 and 8. These contracts appear to be identical in all relevant respects and were received in evidence at Tr. 71-72.

2. The record before the Board does not demonstrate with total conclusiveness whether the supervisors' mem-

<sup>1 &</sup>quot;Tr." refers to the stenographic transcript of the hearing before the Trial Examiner, "Arg. Tr." to the stenographic transcript of the oral argument of this case before the Board. Copies of these transcripts are encolsed, as are copies of the Unions' Constition and Bylaws, Local 134 Exhibits Nos. 1 and 2, received in evidence at Tr. 73-74. Local 134 maintains that also in effect throughout the relevant times herein was the July 1, 1954, Memorandum of Understanding (General Counsel's Exhibit No. 4), which specifies certain working conditions for supervisors.

bership status was active or on withdrawal cards. However, the record does strongly suggest that the P.B.X. Foremen, Cable Foremen and General Foremen were on active status.

The parties at the hearing below evidently assumed that the record established that the Company was interpreting and enforcing the union-security provisions of its collective bargaining contracts with Local 134 as requiring the active, full membership of these foremen (Tr. 47-48, 440-441, 462-468, 524, 533-535, 607. General Counsel's Exhibits No. 7, pp. 2-5, 43, and No. 8, pp. 2-5, 45 (Art. III, Sec. 1, Art. II. Sec. 1, Art. I, Sec. 1, Exhibit A)). The question was even raised at the hearing whether this apparent requirement was similarly applicable to assistant staff supervisors, whom the Trial Examiner and the Board subsequently found were not supervisors or grievance-adjustment representatives within the meaning of Sections 2(3), 2(11), 8(b) (1) (B) and 14(a) of the Act (Tr. 197, 199-200, 204-205, 468, 510-511; cf. Tr. 534-537, 608-611).

Although the International's constitution prohibits attendance at local union meetings by mere withdrawal card holders (Local 134 Exhibit No. 1, p. 78 (Art. XXVI, Sec. 2)), the record also indicates that some of the supervisors in question did attend a Local 134 meeting on May 7, 1968 (Tr. 459-462, 646). And at the consolidated oral argument before the Board of the instant case and Local 2150, International Brotherhood of Electrical Workers, AFL-CIO (Wisconsin Electric Power Company), 192 NLRB No. 16, enforcement pending, C.A. 7, No. 71-1864, there was some discussion about the fact that the disciplined supervisors in the Local 2150 case were merely withdrawal card holders (Arg. Tr. 16, 47), but no mention of such status was made as to those in the case at bar.

Nevertheless, at least one supervisory employee, Leonard Farrell, testified that he had "taken an honorary from Local 134" at some unspecified time apparently subsequent to the strike (Tr. 373-4). And early in the hearing the counsel for the General Counsel refused to

stipulate that the disciplined supervisors were active, full members (Tr. 48).

3. Nothing in the record before the Board indicates that the supervisors in question were not permitted to participate in the variety of benefit plans open to both active members and those holding withdrawal cards. The International Union's pension benefits and death benefits plans (Local 134 Exhibit No. 1, pp. 30-39, (Arts. XII and XIII)) appear to be equally open to active "A" members and those holding participating withdrawal cards, though not to active "BA" members and holders of honorary withdrawal cards who make no financial contribution to such benefit plans (Id., at pp. 6, 28-29, 77-78 (dues schedule, Art. X, Secs. 2-6, Art. XXVI, Secs. 1-4)). In addition, Local 134 sponsors group life insurance and old age benefits plans which are likewise open both to active members and to those on withdrawal cards (Local 134 Exhibit No. 2, pp. 34-37, 51 (Arts. XIII-XIV. Art. XVII, Sec. 21).2 One supervisor, James Howe, testified that he participated in pension and insurance benefits plans (Tr. 434-437).

4. The parties respectfully wish to advise the court that they do not deem the factors discussed above to be determinative of the issue presented herein (Board's Decision and Onder to 27)

cision and Order, page 7).

Dated at Washington, D. C. this 14th day of February, 1973.

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS
BOARD

Dated at Washington, D. C. this 14th day of February, 1973

/s/ Laurence J. Cohen
LAURENCE J. COHEN
Counsel for Petitioners

<sup>&</sup>lt;sup>2</sup> The Unions consider both types of withdrawal card holders subject to discipline (Local 134 Exhibit No. 1, p. 79 (Art. XXVI, Sec. 5)).

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

#### No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and Local 134, INTERNATIONAL BROTHER-HOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

# NATIONAL LABOR RELATIONS BOARD, RESPONDENT

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the response to the court's order of February 9, 1973, in the above-captioned case has this day been served air mail upon the counsels listed below:

George B. Christiansen, Esquire Suite 5000, First National Plaza Chicago, Illinois 60670 Robert E. Fitzgerald, Jr., Esquire 53 West Jackson Blvd. Chicago, Illinois 60604

Dated at Washington, D. C. this 14th day of February, 1973.

- /s/ Marcel Mallet-Prevost
  MARCEL MALLET-PREVOST
  Assistant General Counsel
  NATIONAL LABOR RELATIONS
  BOARD
- /s/ Laurence J. Cohen LAURENCE J. COHEN Counsel for Petitioners

Law Offices of ROBERT E. FITZGERALD, JR. 53 West Jackson Blvd., Suite 1112 Chicago, Illinois 60604 WAbash 2-3113 [Union Logo]

February 16, 1973

Honorable Hugh E. Kline, Clerk
United States Court of Appeals
for the District of Columbia
U. S. Courthouse
Constitution Avenue and John Marshall Place
Washington, D.C. 20001

RE: I.B.E.W. et al. vs. N.L.R.B. No. 71-1559

#### Honored Sir:

I am in receipt of the joint "Response of the Parties to the Court's Order of February 9, 1973," by the attorneys for the NLRB and the International Union under date of February 14, 1973.

I note that the last sentence of Footnote 1, which reads

as follows:

Local 134 maintains that also in effect throughout the relevant times herein was the July 1, 1954 Memorandum of Understanding (General Counsel's Exhibit No. 4), which specifies certain working conditions for supervisors.

makes reference to the July 1, 1954 Agreement between Illinois Bell and Local Union 134. This statement is correct, but I feel incomplete.

Enclosed are nine (9) conformed copies of an "Agreement between Local 134, I.B.E.W. and Illinois Bell", dated September 28, 1971, to be presented to the Judges of this Court. This document complies with the Court's Order of February 9, Sub-Section 1, because it is evi-

dence of the continued existence of the July 1, 1954

Agreement.

It would be appreciated if you would bring this document to the attention of the Judges of your Court at your earliest convenience.

> Very truly yours, ROBERT E. FITZGERALD, JR.

REF:jst Enclosures

cc: Laurence J. Cohen, Esq. 1125 - 15th Street N.W. Washington, D.C. 20005

> Daniel M. Katz, Esq. National Labor Relations Board 1717 Pennsylvania Avenue N.W. Washington, D.C. 20570

George B. Christensen, Esq. Winston & Strawn One First National Plaza Chicago, Illinois 60670

### AGREEMENT BETWEEN LOCAL 134, I.B.E.W. AND ILLINOIS BELL

Local Union 134, I.B.E.W., and Illinois Bell Telephone Company hereby reaffirm the agreement previously made effective between the parties on July 1, 1954, regarding the status of General Foremen and Foremen as Union

members. (Copy attached) ·

The Company hereby agrees to refrain from initiating any effort to bring about the removal or exclusion from the bargaining unit of the General Foremen, PBX Installation Foremen and Building Cable Foremen, by persuasion, bargaining, recourse to the National Labor Relations Board or the courts, or by any other means whatsoever.

In consideration for the above, and as long as there occurs no breach of this Agreement or the July 1, 1954 Agreement by the Company, Local 134, I.B.E.W., agrees to suspend its jurisdiction over the performance of work on Residential Family Plan and Home Interphone to other Local Unions of the I.B.E.W. currently representing employees of the Company's Plant Department.

A claim of violation of this Agreement by either party shall be subject to the grievance and arbitration procedure of the collective bargaining Agreement between the parties covering the employees represented by Local 134.

LOCAL 134, I. B. E. W.

/s/ Francis J. Cunningham Business Representative

ILLINOIS BELL TELEPHONE
COMPANY

/s/ [Illegible]
Assistant Vice President
Labor Relations

Dated: Sept. 28, 1971

# [1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

#### THIRTEENTH REGION

Case No. 13 CB 2890

#### IN THE MATTER OF:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO (ILLINOIS BELL TELE-PHONE COMPANY)

#### and

BELL SUPERVISORS PROTECTIVE ASSSOCIATION (Not a Labor Organization)

Hearing Room 824-A, 219 South Dearborn Street, Chicago, Illinois, Tuesday, March 31, 1970

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.,

## BEFORE:

FREDERICK U. REEL, Trial Examiner.

# APPEARANCES:

LAURENCE J. COHÉN, Esq., Sherman, Dunn & Cohen, Suite 500, 1200 - 15th Street, N.W., Washington, D.C., appearing on behalf of the Respondent, International Brotherhood of Electrical Workers, AFL-CIO.

ROBERT E. FITZGERALD and E. J. CALIHAN, Jr., Esqs., 53 West Jackson Boulevard, Chicago, Illinois, appearing on behalf of the Respondent, Local 134, International Brotherhood of Electrical Workers.

- [2] GEORGE B. CHRISTENSEN, Esq., and JOHN C. MALUGEN, Esq., 5000 First National Plaza, Chicago, Illinois, appearing on behalf of Bell Supervisors Protective Association, Charging Party.
  - MICHAEL TURNER and JULIAN D. SCHREIB-ER, Esq., 219 South Dearborn Street, Chicago, Illinois, appearing as counsel on behalf of the General Counsel National Labor Relations Board.
  - PAUL J. FURLONG, Esq., 225 West Randolph Street, Chicago, Illinois, 60606, Suite 27-A, appearing on behalf of the Other Party, Illinois Bell Telephone Company.
- [36] TRIAL EXAMINER: During an extended off-the-record discussion of subpenas, all parties, as I understand it, are prepared to agree to the following stipulation; namely, it is stipulated by and between all the parties hereto that all of the men named in appendix A and appendix B of the complaint did during the period of May 8th to September 20, 1968, perform work which in normal times would lie within the exclusive jurisdiction of Local 134 and also during the same period performed work of a supervisory nature.

Is that stipulation acceptable to the General Counsel?

MR. TURNER: Yes, it is.

TRIAL EXAMINER: To the respondents:

MR. FIRTZGERALD: I'm sorry. I think I followed actually, but could I have it read back;

(Record read)

TRIAL EXAMINER: Go on.

MR. FITZGERALD: Sort of not an afterthought but just [37] so we are clear when we say "performed work within the normal times," which would lie within the jurisdiction of Local 134, we are talking about Journeymen craftsmen work. In other words, craft type work which journeymen craftsmen would do; is that correct?

TRIAL EXAMINER: Is that your understanding,

Mr. General Counsel?

MR. TURNER: Yes, I believe so.

TRIAL EXAMINER: With that understanding, if General Counsel is agreeable and I take it you are there-

fore, Mr. Fitzberald, for the respondent?

MR. FITZGERALD: Yes. On the understanding that we are because of the inability of the company to respond fully to 2 and 3 of the subpoena, we don't know what percentage of the work of those who ere fined in Exhibit A may have done some supervisory work in the sense of foremen and general foremen type work.

TRIAL EXAMINER: At any rate, the stipulation is

phrased satisfactorily.

MR. FITZGERALD: Yes.

TRIAL EXAMINER: And with you, Mr. Cohen, I take it?

MR. COHEN: Just my agreement was that we don't want to be in the position of agreeing that if these fellows in Appendix 8 did foremen or general foremen work, that that was supervisory in nature and therefore the supervisory issue [38] is somehow resolved by the stipulation.

TRIAL EXAMINER: I understand.

MR. FITZGERALD: We are reserving our right on

supervisory nature.

TRIAL EXAMINER: It is understood that this stipulation is not intended to cover what my be the fundamental issue in this case; namely, whether the work, normal work of a P.B.X. installation foreman, for example, is or is not of a supervisory nature within the meaning of the supervisor as defined in the Act and that is understood, also, is it not, gentlemen, that that stipulation isn't intended to cover that issue.

Now, with the various explanations thus made is the stipulation satisfactory to the respondents?

MR. FITZGERALD: Yes.

MR. COHEN: Yes.

TRIAL EXAMINER: And to the charging party?

MR. CHRISTENSEN: Yes.

TRIAL EXAMINER: And still to the General Counsel?

MR. TURNER: Yes.

[49] TRIAL EXAMINER: 5 (a), (b), (c), and (d), now stand admitted. 5 (3) stands denied. That in a word is what we have accomplished.

Go ahead.

MR. FITZGERALD: We have had rather extensive discussion on paragraph 6 (a), (b), and (c), and I frankly think that we would waste more time than we would be able to save on any agreements in this paragraph. I think it goes to the nature of the case and the question of all of the job categories having the various indicia of authority is just what is in dispute and, of course, C is the conclusionary paragraph on supervisory status which I think we should leave all of 6 denied.

MR. TURNER: And 7(a), it will be amended to

read, "May 8, 1968," and will stand as admitted.

TRIAL EXAMINER: Is that all right. That's a correction of the date?

MR. FITZGERALD: Yes.

TRIAL EXAMINER: Very well. That amendment is allowed. Go ahead.

[52] TRIAL EXAMINER: The allegations of paragraph 7 (c) and (e) will remain denied. The allegation of 3 (d) remains denied except that it is admitted that the respondent local imposed fines on the individuals named in appendix A and is admitted by both the local and the internationl; is that correct?

MR. COHEN: Yes.

TRIAL EXAMINER: Continuing on the record, what about 7 (f)? Is that to be altered?

MR. FITZGERALD: I don't know if you want to get the reason for the denial on the record. If it's denied, it's denied. It is denied because of the wording—

TRIAL EXAMINER: Well, now, rather than going through this paragraph by paragraph, I thought you gentlemen had some affirmative stipulations you wanted to put on the record.

MR. TURNER: We can stipulate with regard to 7 (f) that the persons named in appendix B were fined by Local 134 because of their leadership as officers in the Bell Supervisors Protective Association; can't we?

MR. FITZGERALD: Let me read what language we could admit to and maybe that would be satisfactory.

We will admit that they were fined by respondent [53] Local 134 because—this is the new language—they engaged in activities which resulted in the formation of the Bell Supervisors Protective Association, which was found by the union to cause dissension and dissatisfaction among the members of the union and was detrimental and opposed to the I.B.E.W.

MR. SCHREIBER: With all due respect, that sounds

like your brief, and we cannot stipulate.

MR. TURNER: We can stipulate to facts, not the reasons.

MR. FITZGERALD: The reason I went to the other part was because that's what appears in the findings of the trial board and which will be part of our evidence, if necessary.

TRIAL EXAMINER: All right. There is no stipulation. I take it you continue to adhere to your denial of

7(f)?

MR. FITZGERALD: Particularly the "participation in" aspect of it.

TRIAL EXAMINER: Could 7 (f) be admitted if

that phrase were stricken?

MR. FITZGERALD: It could if "leadership in" is understood in the context of being the initial officers which form the organization.

MR. TURNER: Why don't we stipulate to that and leave (f) denied and go ahead and prove their participa-

tion and stipulate.

[54] We can stipulate that they were fined because of their leadership as officers in the Bell Protective Association.

TRIAL EXAMINER: Will you stipulate to that?

MR. FITZGERALD: Yes.

TRIAL EXAMINER: I understand then it is stipulated that the persons named in the appendix B of

the complaint were fined by respondent Local 134 because of their leadership in the Bell Supervisors Protective Association.

MR. TURNER: With the understanding that the General Counsel does not waive his position with regard to other allegations in (f)-

TRIAL EXAMINER: You are going to waive your position. I don't know why you are going to have to prove any more than you just admitted.

You don't waive anything about that stipulation, Mr.

Turner? Go ahead.

MR. FITZGERALD: I don't see any sense in stipulating to (e) because the union's position is as stated previously, the purpose of the association was for strikebreaking and other conduct detrimental to the union.

From here on Mr. Cohen might engage in the discussion on stipulation because they pertain particularly

to the International.

TRIAL EXAMINER: Paragraph 8 (a) was admitted. Do you [55] have anything further you want to change the pleadings on?

MR. COHEN: No. 8(a)—the first paragraph we

get to is 8(b), which we will admit.

MR. TURNER: First of all, let's amend the-

MR. COHEN: I will get to that. Do you want to do that first?

MR. TURNER: I think we should.

MR. COHEN: We have agreed on appendix A, Mr. Examiner, that the name of D. L Macleanan, M-a-cl-e-a-n-a-n, is to be removed and after "R. A. Hawkins, Sr.," is to be inserted—

TRIAL EXAMINER: Appendix B?

MR. TURNER:

MR. COHEN:

TRIAL EXAMINER: I'm sorry. Macleanan is deleted and who is added?

MR. COHEN: Hawkins is there. We are adding "Senior" after his name. We have also agreed on appendix B after the listing of Hawkins there that we will add "Junior," two different individuals on A and B. And with those amendments in A the International

and the Local now admit paragraph 8 (b).

Now, 8 (c) certain changes will be admitted. We have agreed that an international vice president affirmed the local's decision to fine the individuals [56] on appendix A except that Messrs. Anderson, Marqua, M-a-rq-u-a, and Schroeder had their appeals sustained by the vice president.

They all appear on appendix A and that in three—

MR. TURNER: Are you going to give the reasons-

MR. COHEN: Yes.

TRIAL EXAMINER: Anderson, Marqua, and Schroeder were not?

MR. COHEN: Their appeals?

TRIAL EXAMINER: Their fines didn't stick.

MR. COHEN: Right. The vice president found for them on the grounds that the charges had not been filed in timely fashion. There was a procedural ruling under the I.B.E.W. constitution.

In three other cases, Novello, Shraag, and Hawkins, Sr., the appeals were not—there was no ruling on the merits. Those three were ruled improper because the appeals were untimely.

Now, with those exceptions-

TRIAL EXAMINER: And the fine was sustained because the appeal was untimely?

MR. COHEN: Correct. With those sanctions we will

admit paragraph 8 (c).

Now, I have one stipulation which I think the [57] General Counsel will join as to accuracy, but not relevance; that is, in addition to the individuals listed on appendix A a total of 39 other members who were fined by the Local had their appeals sustained that is, the fines thrown out by the International vice president.

TRIAL EXAMINER: Their cases therefore are ex-

actly alike.

MR. COHEN: As Anderson, Marqua, Schroeder.

MR. TURNER: For the reasons-

MR. COHEN: For the same reasons that the charges were not timely filed?

MR. SCHREIBER: Those people do not appear in either of the appendices; do they?

MR. COHEN: Correct.

MR. SCHREIBER: They do not appear?

MR. COHEN: Right, they do not appear. Shall I go on or do you want a statement on the record from them that they agree?

TRIAL EXAMINER: I take it their silence will rep-

resent agreement.

MR. COHEN: Now, 8 (d) we will admit again with certain exceptions.

May we go off the record for one second?

(Discussion off the record)

[58] TRIAL EXAMINER: On the record.

MR. COHEN: In 8(a) we will admit that under the I.B.E.W. constitution the individuals in appendix A appealed the decisions of the vice president to the International president of the union, except that Anderson, Marqua, and Schroeder did not appeal and in the cases of Goodrich, Howe, and Wheller no appeals were received by the International president.

With those exceptions we admit 8(d).

8(e), the dates there should be changed from late May and/or early August, 1969, to read: "May and June, 1969," and with respect to the substances of that paragraph we will admit that the International president affirmed the decisions of the vice president upholding the fines for the individuals named in appendix A, except for the same six individuals who were excepted in 8 (d); namely Anderson, Marqua, Schroeder, Goodrich, Howe, and Wheeler.

TRIAL EXAMINER: Do you accept that change of

date, General Counsel?

MR. TURNER: Yes.

MR. COHEN: Do you want reasons?

MR. TURNER: Yes, we want reasons for those, as well as if there are—

TRIAL EXAMINER: Reasons of whom?

[59] MR. TURNER: Reasons why they are taken out of—

TRIAL EXAMINER: They are taken out because they won before the vice president, obviously.

MR. COHEN: Three of them did not, but no appeals

were received.

MR. CHRISTENSEN: Same reasons as stated in 8(d).

TRIAL EXAMINER: Same reasons. Now, what about that change of date? I take it that's all right with the General Counsel?

MR. TURNER: Yes, that's all right.

TRIAL EXAMINER: The complaint will stand amended and the allegation admitted as stated by Mr. Cohen.

MR. COHEN: Maybe the General Counsel would like

to propose the amendment on 9.

MR. TURNER: Pursuant to an off-the-record discussion with the respondents, General Counsel notifying them prior to the hearing, indicated that in accordance with the stipulations aforementioned that 9 would be amended to read 9 (a) in or about October, 1969, and continuing to date respondent's Local 134 through officers and agents have attempted to collect and have in fact collected said fines imposed on persons named in appendix A; 9 (b) to read in or about 1969 and continuing to date respondent Local 134 to officers and agents have attempted to collect and have in fact collected said fines imposed on persons named in [60] Appendix B and it is the understanding of counsel for the General Counsel that—I will let respondent speak as far as their answers are concerned.

MR. FITZGERALD: Where we admit the amended 9 (a), so far as 9 (b) is concerned, I think it better to deny except to the extent that the local has for Anderson, Marqua, and Schroeder, a small partial payment which was in the nature of preliminary payments pending appeal

as required by the international constitution.

In other words, we have not collected, although we have attempted to collect the fines from those listed in appendix B, the collections ran only to the amount of \$60.00 each from Anderson, Marqua, and Schroeder.

MR. TURNER: Have you also attempted to collect

from the other two in appendix B?

MR. FITZGERALD: There is an attempt to collect

from all five, yes.

TRIAL EXAMINER: I'm sure that meets the requirements General Counsel sees in his case, in any event. Some of these details may go to remedy if an order issues, and they really need not be explored fully at this time. I don't mean remedy; I mean compliance if an order issues.

9 (a) as amended stands admitted: 9 (b) is denied with the limitations expressed by Mr. Fitzgerald on his

denial.

[61] MR. TURNER: May I also ask if the respondent for the local was in accord with the stipulations or admis-

sions by the International on the prior-

TRIAL EXAMINER: I understood that Mr. Fitzgerald introduced Mr. Cohen to this point of discussion with an indication he would abide by any concessions Mr. Cohen saw fit to make.

Does that exhaust the preliminary matters, as well as-

MR. COHEN: Nothing else until 13; is there?

MR. TURNER: I don't think so.

MR. COHEN: Do you want to amend 13 (a)?

MR. TURNER: 13 (a) will now read-

TRIAL EXAMINER: Just give me the change. Simply adding (a) and (b) after 9.

MR. COHEN: No.

MR. TURNER: Just adding (a) after 9.

TRIAL EXAMINER: Oh, yes. You might look over 13 and see if you might make it conform to the English language a little bit.

MR. TURNER: I think we better leave it.

TRIAL EXAMINER: That is a real concession of failure, it seems to me.

I respectfully suggest, gentlemen, that professional people ought to be able to draft their pleadings [62] in parsable, and to get back to grade school and high school, diagramably possible English sentences, and this is not.

Now, I suppose that what you are saying in paragraph 13, if I may try my hand at it, is that, "Respondent International by its conduct sanctioned the conduct of Local 134 and the foreseeable affect of such conduct."

Now, whose conduct the International or the Locals, as described in certain paragraphs was as described in cer-

tain other paragraphs.

I will pass the matter now because I don't want you to take more time at it, but I would suggest that it is far from an understandable allegation.

Mr. Turner: All right.

TRIAL EXAMINER: And it should be amended just for the sake of everyone's professional reputation.

MR. TURNER: After a recess we will amend the com-

plaint to read more legibly.

TRIAL EXAMINER: Are there any other preliminary

matters?

MR. COHEN: Our denial, whatever the grammatical form of paragraph 13, stands. On the 13 (b) we would deny that in our answers. We have, however, worked out a stipulation with the General Counsel to read as follows: [63] that the International has collected no fines imposed on persons named in appendix A and has made no overt attempt to collect any fines imposed on those persons.

TRIAL EXAMINER: All right. Is that stipulated?

MR. TURNER: We will stipulate to that.

# [75]

## EDWARD DEADY

was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and, having been first duly sworn, was examined, and testified as follows:

# DIRECT EXAMINATION

Q. (By Mr. Turner) Would you please state your name and address?

A. Edward P. Deady, 932 South Westley, Oak Park, Illinois.

TRIAL EXAMINER: What was that name?

THE WITNESS: Deady, D-e-a-d-y.

Q. (By Mr. Turner) Mr. Deady, where are you presently employed?

- A. Employed for Illinois Bell Telephone Co.
- Q. And how long have you been there?
- A. I have been there since 1946, February.
- Q. What is your current job position?
- A. I am an operational supervisor in the methods and procedure division of the operation of the company.
- [78] Q. Would you please describe the line organization as it exists in the last four years?
- A. We have first level management supervisors, which is the first level of management in the company. We have second line, which are chiefs, wire chief, superintendent. We have the district plant managers, which are third line division level, which is 4, and department head, which is 5th, and then the plant superintendent reports to a vice president of operations who in turns reports to a vice [79] president of operations, who in turn reports to a vice president executive of operations, who reports to the president.
- Q. Now, let me ask you this: how long has this line organization you described existed?
- A. As long as I have been a supervisor it's existed. I haven't any knowledge of any other organization, lines of organization.
- Q. Well, have the P.B.X. foremen ever reported to anyone else than district installation superintendent?
- A. Prior to my being appointed a P.B.X. foreman, they did report to a general foreman. That was before my appointment.
  - Q. How do you know this?
- A. Because I worked for a foreman who reported to a general foreman.
- I was a temporary foreman working for a general foreman.
- Q. Now, what positions are included within the first level of management?
- A. We have construction foremen, plant assignment foremen, repair foremen, central office foremen, which are

called a switching foreman today, control foreman, building cable foreman, and P.B.X. foreman.

Q. Would you please tell me what P.B.X. stands for? [80] A. It is derived from the private branch exchange, which is a switchboard or a switching system or some telephone apparatus that the customer has on his private premises that is installed and maintained by the telephone company.

Q. Are you familiar with the duties of a P.B.X. fore-

man?

A. Yes, I am.

Q. Now, based upon your experience and knowledge acquired as a result of holding the various positions you have described, would you please describe what the function of the P.B.X. foreman is?

A. The P.B.X. foreman is assigned an area in a district, either it could be—if there's only one P.B.X. foreman in the district, he could have the entire area or he could work in a sub-district where there's more than one or one or more.

He would have a group of craftsmen which would be

apprentices and journeymen working for him.

He would get a building area or an amount of territory, as we say, like downtown. We'd give him a district or an entire area of that where he would be responsible for all the installation activities in that area. He would get his orders for work either from the business office through the plant assignment forces. He would get engineering orders or work orders and normally [81] he would have the total responsibility of all the activities in that area and the responsibility of the people.

Q. Now, you mentioned a crew. Is there anybody as-

signed to a P.B.X. foreman?

A. Yes. There are a number of P.B.X. apprentices and

journeymen assigned to him.

Q. If you know, from the basis of your experience and knowledge what is the average number of journeymen and apprentices assigned to a P.B.X. foreman?

A. It would be eight to ten, maybe more, depending on the type of job he has. Usually about eight to ten right now. [85] Q. Who assigns the work to the crew assigned to the P.B.X. foreman?

A. The P.B.X. foreman does that.

Q. Does he have to check with anybody first?

A. No.

Q. Did you have to check with anybody when you were

assigned?

A. As long as I have the capable people in my crew to get the work done with the people I have, I have no problem.

Q. Well, on what basis does the foreman assign spe-

cific employes to perform the job, if any?

A. He assigns them by their experience and technical experience, background, their performance ability.

Q. How would he know this?

A. By their training and by being their supervisor.

Q. Does he have access to any of their files?

A. He has access to all the employe's files under him.

Q. Well, what kind of files are we talking about?

A. Well, training records that he would schedule or [86] training. He would know what their training was. He would have their personnel file, which is usually kept in the district office. He would have access to that. He'd have their absentee record, their schooling, and he would program their training.

[87] TRIAL EXAMINER: There's been some suggestion here, Mr. Deady, that there's a good deal of variation among the P.B.X. installation foremen in terms of their duties or responsibilities.

Have you observed any such? Are you aware of any such?

A. No. All the responsibilities are similar in nature. The job content would be that all first-level management people in the company have an equal responsibility.

[93] Q. Does the P.B.X. foreman assign work?

A. Yes.

Q. And how does he do this?

- A. He assigns the work by the orders that are issued him by the company and the time required to do the work and to get the order done with the service interval and the request by the customer and the ability of the craftsmen to do such.
  - Q. Did you assign work as a P.B.X. foreman?

A. Yes, I did.

Q. Do you know whether this practice existed subsequent to the strike?

A. Yes, it was.

Q. And now, does the P.B.X. foreman have to check with anyone before assigning the work?

A. No.

Q. Well, how many jobs does a P.B.X. foreman have

under his jurisdiction at one time?

A. He could have either, if he's on a large job, just one with all his old crew on, but if he had a crew of eight or ten people, he would probably have six jobs or if one installer may have four jobs for one day or he may have ten years going on jobs at one time.

Q. It varies?

A. Varies; right.

[94] Q. Is there more than one man working on the same job?

A. Yes, there is.

Q. Who determines how many employees work on a particular job?

A. The foreman would do this.

Q. Does he have to check with anybody first?

A. No.

Q. Did this exist when you were P.B.X. foreman, this authority?

A. Yes.

Q. And if you know, did it exist subsequent to the strike?

A. Yes.

Q. Let me withdraw that. Then who determines which particular crew members are assigned to a particular job?

A. The P.B.X. foreman.

Q. And what basis is the determination made?

A. On their ability and their experience and the num-

ber of people or the time element to the job.

Q. Does the P.B.X. foreman need approval or permission from any of his supervisors in order to make these determinations?

A. No. Does the craftsman ever get transferred or journeyman or apprentice ever get transferred from one job to another before he's finished a particular job?

- [95] A. If the foreman so needed help in another job, he would delegate the craftsman to go to another job or leave his job or if something was more of a priority in his judgment, if he needed the work done, and this other man needed help, he'd move him.
- Q. Can this craftsman or journeyman or apprentice move on his own from one job before he's finished?
  - A. No.
  - Q. Who, if anyone, does he have to check with?
  - A. He would check with his foreman.
- Q. Does the foreman have to check with anyone before making a decision?
  - A. No.
- Q. Does the foreman ever initiate the decision then to transfer men from one job to another?
  - A. He does this on a daily basis.
  - Q. For what purpose would he do it?
- A. The work content of the job, a cancellation. He may assign an over to an installer, only one order, and then he wouldn't have the job to go to when he got there. He would have to reassign him to another location.
  - Q. Do emergencies, as far as time targets, ever arise?
- A. You can get a job in Jeopardy. You can call it today. We would move an installer, eight or more installers; as long as he had them under his jurisdiction, he could [96] move them to more than one job for an emergency.

MR. CHRISTENSEN: What do you mean by "jeopardy"?

THE WITNESS: For some reason the service would not be started for the customer.

Q. (By Mr. Turner) As P.B.X. foreman did you move men from one job to another before they completed their assignment?

A. Yes, I did.

Q. Did you have to check with anybody?

A. No.

Q. As district installation superintendent, do you know whether the practice existed under you, as well?

A. Yes.

Q. What "yes"?

A. It did.

Q. And do you know whether this practice existed subsequent to the strike?

A. Yes, it did.

Q. Does the P.B.X. foreman ever loan a man to another foreman in the same district?

A. P.B.X. foremen would do this, as long as it's in the same district. I ought to clarify that. It's more than one district, some sub-districts the superintendent would normally expect the foreman to cooperate with each other and transfer people in his own area to accomplish his work [97] operations.

Q. How do you know this?

A. Because I as the superintendent instructed my

foremen to do this, and they did it.

Q. And what about you as a P.B.X. foreman? Did you ever loan a man to another foreman in the same district?

A. Yes, I did.

Q. Did you check with anybody first?

A. No.

Q. Now, who determines when this situation would occur? Why don't you tell us how the situation would

arise? Give us an example?

A. Well, if I was a P.B.X. foreman and I had a job that I only had six men available or didn't have any man available, I would go to another foreman and request an installer.

He would send me the installer; I would give him the job; and it would work both ways. If he requested help from he, I would send him help and this would be a normal occurrence of the day or else we may transfer work back and forth.

The foreman would give me work and I would give

him work. This would happen.

Q. Did this happen when you were P.B.X. foreman? A. Yes, this happened when I was P.B.X. foreman.

[98] Q. And this existed subsequent to the strike, if you know?

A. Yes.

Q. Did you ever borrow employees from another foreman?

A. Yes, I did.

Q. For what purpose?

A. For work problems, technical assistance I needed for different jobs that I may not have anybody available at the time for, had the time to train, so I would get somebody of higher technical skill to do the job for me.

Q. Did you do that as a P.B.X. foreman?

A. Yes.

Q. Were you ever told you had this authority?

A. Yes, I was.

MR. FITZGERALD: I will object unless we get some specific dates and names.

Q. (By Mr. Turner) Who told you this?

A. My-rephrase the question.

Q. Who told you you had the authority to transfer

employees?

A. My superintendent at the time, in a general meeting of all the foremen, would instruct us to cooperate with each other, and the total goal of the sub-district office at that time was to accomplish installation activities for the foremen.

[99] MR. FITZGERALD: Same objection and ask it be stricken because it's not specific in details. It's just

a generalization.

TRIAL EXAMINER: When was this?

THE WITNESS: This was-

TRIAL EXAMINER: That you were told.

THE WITNESS: I was told this prior to becoming a foreman and subsequently reviewed with me our objectives by superintendents that I worked for.

TRIAL EXAMINER: Objection overruled. The testimony will stand.

Q. (By Mr. Turner) Who determines if a borrowed

employe is qualified to do the work?

A. Well, usually the foreman would know that and request certain talents and skills from the foreman and ask him if he'd send him this.

MR. FITZGERALD: Mr. Examiner, I have to object in that I think I have been very patient and we are

getting into further and further generalities.

The last answer is whethere usually the man might know this. It's much too general. I think we have to be more specific if we are going to prove supervisory status.

I know we are talking about general company policy and the way it should operate and we will get into more specifics later with foremen, but we are just [100] getting too big.

Q. (By Mr. Turner) Well, why don't you. I ask you as P.B.X. foreman if you borrowed an employe? Did

you go through this process you described?

A. Yes, I have.

Q. Did you have to check with anybody first?

A. No, I did not.

Q. Do you know whether this practice existed subsequent to the strike?

A. It did.

Q. Is there a sub-supervisor or a leadman in charge of a group of men working in a particular job?

A. No, there is not.

Q. Why not?

- A. Because the only supervisors we have are firstlevel management people.
- [104] Q. Who, if anyone, has the authority to excuse tardiness of a journeyman or an apprentice?

A. The craftsman-I'm sorry-the foreman.

Q. What foreman?

A. The P.B.X. foreman or any foreman could do this.

Q. Any first-line foreman?

A. Any first-line foreman.

And would you please give examples of how he

would exercise this authority?

A. Well, if the craftsman called the foreman and told him he would be tardy for some reason, he could say, "Fine. [105] When you get to work, we will talk about it."

He could be on the job at 8:00 o'clock and the craftsmen are in there and the craftsman showed up at 8:30 and he explained the reasons for being tardy or being absent and he could excuse this with no further authority.

Q. Well, are you saying he doesn't have to check with

anybody when he excuses tardiness?

A. No.

Q. Does he have the authority to refuse to excuse it?

A. Yes.

Q. How do you know this?

A. Because at the time of being a foreman, I was instructed by my superiors that my job was to execute company policy, to have my people work, report for work, and to, if they abused any privileges I gave them, I could withhold that.

Q. Did you ever refuse to excuse tardiness, if you can

recall?

A. I can't recall. It's been so long since I had that

problem.

Q. Now, as D.I.S., district installation superintendent, did you give any instructions to the P.B.X. foreman under you?

A. Yes, I instructed them, as I was prior instructed

by [106] my D.I.S. of my responsibilities.

Q. Do you know if the same authority existed subsequent to the strike?

A. Yes.

[112] Q. Do the employes ever leave during the middle of the day for personal business?

A. Yes, they do.

[113] Q. Do they have to check with anybody first?

A. Their foreman.

Q. What do you mean by "Their foreman"?

A. Their first line supervisors there they would check with first if they could find him.

Q. What if they couldn't find him?

A. They would check with another first line superintendent and second line superintendent.

Q. Is there such a thing called personal business?

A. Yes, there is.

Q. Is there such a thing called—do employes as to leave at the end of the day for personal businuess?

A. Yes, they do.

- Q. What is the authority as far as P.B.X. foreman is concerned in granting or refusing to grant such permission?
- A. He can grant it for just cause in his own mind and to his own satisfaction.

He would grant such unless it was abused.

Q. Does he have to check with anybody first?

A. No, he doesn't.

Q. Did you do this as a P.B.X. foreman?

A. Yes.

Q. Do you know whether this practice existed subsequent to the strike?

A. Yes.

[114] Q. Did you ever grant permission them to leave for personal business?

A. Yes.

- Q. Would you give examples of what you mean by "personal business"?
- A. Well, if an employee got an emergency call from his wofe or he had a doctor appointment, couldn't make in an off hour, had some problem, personal problem that he wanted a partial time or he was going to be late bringing his car in to get fixed or bring his kid to school or go to the doctor, or some nature like that, wife, would be a birth in the family.

This would be pre-determined. He would tell the foreman his wife's going to have a baby some day and he would grant this day off when he would call him and tell him. Q. What are the options opened to the P.B.X. foreman in paying craftsmen for personal business once he grants the permission, if any?

A. He could either pay them or not, depending on

how he saw it.

Q. How doy you know he has this authority?

A. Because this is authority that I was told I had this authority to do this.

I could either request hold payment or pay. I [115]

was told by my second line supervisor.

Q. When?

A. When I was a foreman.

Q. Do you also instruct as a D.I.S. your foreman anything in that regard?

A. Yes. I told my first line foreman they had the

authority to either wihold or pay, as they saw fit.

Q. Do you know whether this authority existed subsequent to the strike?

A. Yes, it did.

Q. Have you ever granted permission to leave for personal business?

A. Yes.

Q. Ever denied it?

A. Yes.

Q. When you were P.B.X. foreman?

A. I could not recall the facts or the time, but I don't—I couldn't give you dates or time.

Q. Did you grant permission when you were a P.B.X.

foreman?

A. Yes. I remember granting it, yes.

Q. Did you have to check with anybody at that time when you were granted permission?

A. No, I did not.

Q. Who, if anyone, assigns overtime to the journeymen and [116] the apprentices under P.B.X. foremen?

A. The foreman woul[d], with his workload situation or his work involvement, he would assign the overtime to the craftsman under his jurisdiction, for him.

Q. Does the P.B.X. foreman, as you know, need any written or oral authority in order to assign overtime?

A. He would assign all overtime as necessary to make

the customer's service commitments that are made by the

telephone company.

There are objectives that are set by district installation superintendent and district plant manager of certain objectives of his of overtime that a foreman should work under as far as curtailing the overtime.

He's told not to work unless he can justify it in his

own, for one.

Q. Can you give an example what would an objective be?

A. We had an objective of when I was a foreman of

5 per cent. Now it may be 25. I don't know.

When I was a manager in Franklin it was close to 50 per cent a week objectives. We would let the foreman work this way.

Q. Who's "we"?

A. As a superintendent and as a district plant manager, we would delegate them this authority.

Q. Who is "them"?

[117] A. The P.B.X. foremen and they would make this judgment either to work or not work.

That's their responsibility.

Q. Well, could they ever deviate from these objectives?

A. Yes, they do.

Q. Under what circumstances?

A. If the foreman had an objective, say, of 20 hours a week and he had already worked everybody in his crew 20 hours a week and he had a job that had to be completed, he would go ahead and work that man or the people required to do that job.

Q. Does he have to check with his supervisor or any-

body first?

A. No. He is instructed by the supervisor that the customer service is the prime objective as a supervisor.

MR. CHRISTENSEN: When you say "objective," do you mean a limitation?

THE WITNESS: No. It could be a limitation or objective we don't reach.

We have objectives set for 5, 10 per cent overall. We don't have any limitations on it, to that point.

We have guidelines we are trying to put in here. A foreman would work X-number of hours per man per week for health and reasons of the craftsman.

[118] We would try to help work everybody equally.

Q. (By Mr. Turner) Well, to the best of your knowledge and based upon your knowledge and experience, has the P.B.X. foreman's authority changed with regard to overtime since you were a foreman?

A. No. [119] Q. As district installation foreman did you instruct the P.B.X. foreman what their authority was as regards overtime?

A. Yes.

Q. What did you tell them?

A. I told them it was their responsibility as foremen to work overtime as required to do the job, and they should execute this authority.

Q. With respect to overtime, who determines if it is

needed on a particular job?

A. Well, the foreman would be the prime one who would know, the P.B.X. foreman or the first level supervi-

sor would know the job requirements.

He would set the requirement on the overtime. He would schedule it to the craft and he would tell the superintendent after the fact in most cases why he worked it.

Q. Are there men required to work a certain number

of hours a week?

A. The men are scheduled for 40 hours a week.

Q. Who determines what men are to work overtime

and what basis is this determination made?

- A. The foreman would be. At the time of the overtime that would be required, he would be instructed by his superintendent to give the overtime to the people that were [120] qualified and as much as within his ability, to equally distrivute across his whole work force.
  - Q. Is there an overtime list?

A. Yes, there is.

Q. Would you please tell us what this overtime list is?

A. This was a list that was—when I was a foreman, we had such a list and it's in the same general content today.

It's a charge, a record of the hours worked, and the hours refused by the individual craftsman, who in turn

worked for the foreman.

Q. What is the purpose of the overtime list?

A. The overtime list is a method that we would use as a foreman to equally distribute the overtime in our own group and as a superintendent to keep it across the foreman and his group and, as a manager, to keep it equally distributed between his superintendents.

Q. Well, the P.B.X. foreman deviates from the over-

time list?

A. He does, yes.

Q. Did you say P.B.X. foreman?

A. Yes, I did.

Q. Under what circumstances?

A. If I had a particular job that was required the [121] talents of an installer, what happened to be a frozen list, I didn't refer in the list, he would be frozen as far as the overtime.

Q. Explain "frozen," please.

A. Well, we would have—an agreement with the general foreman and the chief steward who would usually negotiate with the superintendents and they would say anybody over 25 hours of the average would be frozen.

TRIAL EXAMINER: You mean you wouldn't get

any more?

THE WITNESS: We shouldn't allow. He shouldn't be the prime guy to work. He should work after everybody else had worked. This was the objective we had on this. If he happened to have the talent and the only one available, we would work.

Q. (By Mr. Turner) What percentage of the over-

time list is usually frozen?

A. It varies depending on the amount of work—I would say in some areas, in some gangs they probably have 40 per cent of it frzen.

Q. Then is there a 60 per cent leeway as far as dis-

cretion with the P.B.X. foreman?

A. Yes, there is. I would say-

MR. FITZGERALD: That makes 100 per cent.

Q. (By Mr. Turner: Then how would he choose between the 60 percent that is not on the frozen list? [122] A. Well, he would actually take the lowest man with the capability to do the job and work him.

Q. So then the lowest man would not necessarily have

the capabilities in all instances?

A. He would not have the capabilities.

Q. Who makes the decision?

A. The foreman.

Q. What foreman?

A. P.B.X.

Q. Did you make this determination?

A. Yes.

Q. Do you know if this practice exists today for P.B.X. foreman?

A. Yes, it does.

TRIAL EXAMINER: Supposing there was disagreement with some of these determinations of yours. You have mentioned quite a few areas in which the foremen had a certain amount of flexibility.

What if your decision didn't find favor with your

crews.

What do they do about it?

A. THE WITNESS: I'd have a grievance. TRIAL EXAMINER: Who would it go to?

MR. FITZGERALD: Go to me.

TRIAL EXAMINER He said it would go to-

[123] MR. FITZGERALD: Go to me.

TRIAL EXAMINER: He said it would to-

THE WITNESS: As a foreman I'd get the grievance.

Q. (By Mr. Turner) Could it go to the steward?

A. Yes.

Q. Who would the steward bring it to?

A. The steward would bring it to me.

Q. I'll come back to that area a little later.
TRIAL EXAMINER: We'll take a short recess.

(Recess taken)
TRIAL EXAMINER: On the record.

Continue with the examination.

Q. (By Mr. Turner) In your last answer you said "we" or "me."

Who did you mean?

A. I mean P.B.X. foremen.

- [125] Q. The PBX foreman, if you know, does he have any authority with regard to disciplining employes?
  - A. Yes.
- Q. As far as journeymen are concerned, would you pleave give examples of the type of discipline that a P.B.X. foreman can administer, if you know?
- A. A P.B.X. foreman can discipline a journeyman for tardiness. He could suspend for violation of company policy. He could recommend termination.
  - Q. Could you give some examples of the various types of discipline that you have just enumerated, how they [126] would occur, how they arise?
  - A. If a P.B.X. foreman had reasons to go to a job and his people weren't there and he happened to find them either intoxicated on the job or in a saloon someplace on company time, he would suspend.
    - Q. Do you know of any case that this happened?
  - A. This happened to cases where I was a district plant manager. I have done this as district plant manager myself.
  - Q. You said it happened. Who did it happen between when you were district plant manager?
  - A. It happened between the supervisor and the craft, the supervisor; P.B.X. foreman suspended the people in this case.
    - Q. Do you remember what year this was?
  - A. This was probably—let me see—'69, sometime. That would be one of my foremen did this.
    - Q. And do you recall the foreman?
  - A. I recall a recent case of a foreman, Mr. Shaffer did this.
    - Q. And what is Mr. Shaffer's position?
    - A. He's a P.B.X foreman.

Q. And do you recall what Mr. Shaffer did in this case?

A. Well, he'd go back to a job at night and the men [127] weren't there and he'd visited the local bar in the building that was there and he had found his employes there and he sent them home.

Q. How do you know this?

A. Because I had records of that and he had told me this or the records in the company where he had filed this superior action and—

Q. And do you know whether these employes were

sent home?

A. They were sent home that night.

Q. Do you know whether they checked with anyone before sending them home?

A. No.

[128] Q. (By Mr. Turner) You mentioned the authority to discipline for tardiness.

Will you please elaborate on this?

A. If a foreman-

Q. What type of foreman?

A. A P.B.X. foreman, a first line foreman. Can I

clarify something.

That a foreman is a foreman. All foremen are equal in the company. He keeps me asking—asking me about what foremen. They are all foremen, as far as I'm concerned, all first level foremen, and I had all of them working for me. So I refer to all foremen.

[129] Is that all right if I stipulate myself. I get tired

of him asking me the same questions.

TRIAL EXAMINER: You may be tired, but he may from time to time, to keep the record very clear, ask you

anyway.

THE WITNESS: A P.B.X. foreman, if he asked me if he had an employe, either an apprentice or a craftsman journeyman, so-called w orking for him who was a chronic tardiness, we call chronic, if he had talked to him, he had visited him on the job and he wasn't there and he gave him explanation and he may have documented, he may have not documented it, all depending

on what the foreman—the way the foreman would operate, he would say the next time you're tardy, I'm just going to have to dock you, and he would dock him some part of his salary.

Q. (By Mr. Turner) How do you know about this

authority?

A. There was this given to me as a foreman. I was told my job was to execute the company policy and have people to work on time.

Q. Who told you this?

A. My superintendent. And the company, when I was trained as a foreman, I was told attendance was part of my job.

[132] Q. Now, you mentioned suspension. What is the authority of the P.B.X. foreman, if you know, as far

as suspension?

- A. Well, I have a case, a recent case now, of a P.B.X. foreman who had people reporting on a job and left the job, they called on the job, and it was in the First National Bank. It was 1969. This is a matter of record because the cause was under me. As a manager, I sat in on the arbitration—not the arbitration—but the [133] grievance procedures of this case.
- [134] Q. Do you know in fact who disciplined them at the first step?
  - A. The first step the foreman sent them home.
  - Q. Do you know if he checked with anybody first?

A. Not as far as I know, he didn't.

Q. (By Mr. Turner) Does he have authority to send a [135] man home, the P.B.X. foreman?

A. Yes, he does.

Q. And how do you know this?

A. He's told he has the authority to uphold company policy.

Q. Does he have to check with anybody first?

A. If he's going to suspend under the terms of the agreemnt, he would notify the steward.

Q. Would he have to ask permission from a supervisor first?

A. No.

Q. Did this authority exist when you were a P.B.X. foreman?

A. Yes, it did.

Q. Were you told this by anybody?

A. At the time of my reviewing—being foreman and reviewing the contract, we spent a whole day on the contract and the authority of the first level of management, and this was spelled out by our general personnel people at our training session what our authority was and our superintendents'.

Q. Did I ask you if you ever told any P.B.X. foreman

that they had this authority?

A. Yes, I did.

Q. What position did you hold at that time?

[136] A. I had the position of a superintendent when I had P.B.X. foremen working for me.

I told them they had this authority and as a manager I told my superintendent to tell their foremen they had the authority.

Q. Well, you mentioned documents before.

Does a foreman ever prepare documents when he dis-

ciplines an employe?

A. The foreman in his training on the union contract and his personnel matters is told to keep some record of any matter that is brought to him by a craftsman or a steward for future use in a grievance procedure.

If he terminates and resolves the problem, he may make a personal note and keep it in his personal file, but he's instructed to keep some record of the time and date they

would do this.

Q. Well, let me ask you this: as far as discharging an employe, what is the authority of the P.B.X. foreman?

Discharging or termination, as we call it, is the very greatest offense to our company. We don't do it very readily, but the foreman's recommendation or a previous disciplinary action that was executed by the foreman or he was a part of, foreman, may be more than one fore-

man, would all be part of the recommendation or the total case, whether it would be decided at the—probably what [137] happened, the last foreman who was involved with an action of the employe would recommend termination.

Q. Is a higher level manager above the second or third level, what weight is given to the P.B.X. foreman's rec-

ommendation with regard to discharge?

MR. FITZGERALD: Objection. Now, I don't mind this witness testifying what his objective, mental mechanics may be here; but unless there's some other objective, criterion for what some other people may give in the question of weight, it's not a proper question.

TRIAL EXAMINER: Are you in a position to dis-

charge anybody?

THE WITNESS: Yes. I'm in a position to recommend termination like anybody else. I can go to arbitration.

TRIAL EXAMINER: You are in a position to recommend?

THE WITNESS: Right.

TRIAL EXAMINER: And in making that recommendation do you take into account recommendations of the foremen?

THE WITNESS: Very highly, sir.

- Q. (By Mr. Turner) Let's be more specific in this area. Would you ever recommend termination of a journeyman or an apprentice without consulting with the foreman of this apprentice or journeyman?
  - A. No, I would not.
- Q. How does a P.B.X. foreman know that he has the [138] authority to recommend discharge, if you know?
- A. At the training sessions again, the personnel training session where the contracts review, they go into great detail. He's told at that time. He's told by his superintendents and I have instructed him in a general, either individually or the group, that their authority and their recommendations are highly weighed by the telephone company.

I have never seen a craftsman that's been terminated if the foremen said, "Don't terminate him." He'd usually get another chance.

Q. Have you ever seen a foreman say, "Don't ter-

minate him"?

A. Yes, I've seen a foreman that would give him another chance.

They actually recommend termination once and we get the foreman to concede his termination and transfer the employe away from him and give him another chance.

I've been in those sessions.

[141] Q. (By Mr. Turner) Who does the district installation superintendent, if you know hold responsible for the completion of the work that a P.B.X. foreman assigns?

A. He holds the P.B.X. foreman responsible.

Q. Who, if anyone, if you know, is responsible for the safety of the journeymen and apprentices?

A. The foreman is responsible for the people under

his supervision for safety, P.B.X. foremen.

Q. Does he do anything in this reg[ard]?

[142] A. Well, he visits the job. If he had a case of unsafe act, he would stop the work operation or instruct safety.

Q. Does he ever hold meetings on safety?

A. He schedules meetings every quarter. They are scheduled by the company to hold these meetings.

Q. Are recommendations ever made by P.B.X. foremen with regard to promotion?

A. Yes, they are.

Q. Are these recommendations ever solicited from P.B.X. foremen?

A. The superintendent would solicit the recommendations of his foreman before he in turn would rule on the people the foreman would recommend.

He would have maybe eight foremen working for him. He asked the foremen for the top craftsmen or people they recommend for foremen and from that he would select X-number of names for supervisor promotion.

Q. Were recommendations ever solicited from you as P.B.X. foreman?

A. Yes. I was solicited for people for recommenda-

tion when I was a foreman.

Q. Have there been recommendations from P.B.X. foremen subsequent to the strike?

A. Yes, there has.

- Q. How often are these recommendations solicited, if [143] you know?
- A. The superintendent would probably keep what we call a bench of potential people that are ready for advancement in the company, and he would ask the foreman to evaluate his people, write a recommendation of people that are capable of being management trainees or for transfers of certain types of work in the company.

Q. As a superivsor of P.B.X. foremen and a supervisor of district installation superintendent, if you know, what weight is given to the recommendations of the

P.B.X. foremen?

A. The P.B.X. foreman's recommendation is regarded very highly. In fact, we would have—I myself have never appointed anybody without the recommendation of the P.B.X. foreman, nor has my superintendent.

He would always get at least some foreman to recommend a particular person to be a foreman, but the foreman's recommendation would come prior to any appoint-

ment.

[148] Q. Well, would you describe the instances when a foreman, any first line supervisor or foreman, get a raise at Illinois Bell?

A. A foreman would get a raise when he is promoted from craft to foreman, the initial increase, and then he would go on a management wage administration policy and the superintendent would actually put in the category of his ability and when his intervals of his increases should take place.

Q. Well, does the union, does Local 134, if you know, negotiate any wages for the P.B.X. foremen, building

cable foremen, and general foremen?

[149] A. No, they do not.

Q. No what?

A. They do not.

Did they ever?

Prior to 1955 when I was first a foremen, we were listed in the contract as a wage—as a foreman. We were listed in the contract and our wages were negotiated by them.

Q. If you know, does Local 134 negotiate any benefits for the building cable foremen, general foremen, or P.B.X. foremen who are members of Local 134?

A. They do not.

By the way, and prior testimony when I refer to building cable foreman, P.B.X. foreman and general foreman, are your statements true they were referring to Local 134, members of Local 134, building cable?

A. Building cable P.B.X. and general foremen.

How are the foremen paid, P.B.X. foremen paid, as far as their salary?

A. The foremen are paid by a wage administration policy of the company. They are paid a monthly salary.

[156] Q. (By Mr. Turner) Now, as far as supervision of the first line foremen, you testified earlier that the district installation superintendent supervises the first line foremen?

A. He does.

How close is this supervision?

A. He would have a-the superintendent would have eight maybe varying responsibilities in a district. may have insulation foremen wire, not P.B.X. foremen, assignment foremen and P.B.X. foremen working for him. He would have in some cases the responsibility of the assignment plus the station to station and P.B.X., so he would not be indirect contact with all foremen underneath him on an hourly basis or day-to-day basis.

Q. What is the superintendent or wire chief's day-today contact with the crew under the P.B.X. foreman, if

you know?

A. It's very nominal. He would be maybe visiting a job or two. Where the foreman is in the field 70 per cent of the time, the superintendent is in the office 70

per cent of the time.

Q. Well, then how often would a superintendent go round checking the jobs with an individual P.B.X. foreman?

A. Once a week, once a month, depending on how his

[157] was available.

[164] MR. TURNER: Well, based upon your experience and knowledge, where does this grievance procedure being, if you know?

THE WITNESS: It begins at the first level of man-

agement, the foreman.

Q. (By Mr. Turner) How would it arise?

A. An installer or craftsman or apprentice would either himself or with the steward bring a grievance to the foreman.

Q. Well, are you saying there are alternatives at

[165] the first step.

A. The craftsman could go to the steward and the steward could talk in his behalf.

Q. To who?

A. The foreman, the first line foreman.

Q. Could the craftsman go directly to the foreman?

A. Yes, he could.

Q. (By Mr. Turner) Based upon your experience and knowledge, will you please tell me who the first company representative is that is contacted by a steward or an employe with a grievance or a complaint?

[166] A. The first line management, the foreman.

Q. Who do you mean by this?

A. Any first-level management, foreman, would be construction foreman, plant assignment foreman, P.B.X. foreman, building cable foreman.

They would be considered the first line grievance pro-

cedure.

Q. Are there any other foremen within this first line

foreman that you mentioned?

A. All foremen in the plant that would be the switch foreman, construction foreman, line foreman would be

the first level of management that would get this grievance.

Q. What about the plant assignment foreman?

A. Plant assignment foreman would get this. Anybody who would have craft people reporting to him would be the first line.

Q. Based upon your experience and knowledge, what is the authority, if you know, of the P.B.X. foreman or first line supervisor at the first step of the grievance

procedure?

A. As a P.B.X. foreman and my instruction from the company, I was instructed I was to resolve all grievances possibly at the first level, and this was the intent of the company and still is, so far as I know, the first step [167] should resolve all grievances they possibly can.

Q. Who?

A. The first line supervisor.

Q. And did you ever instruct any P.B.X. foremen in

this regard?

A. Yes. I instructed all new P.B.X. foremen that would come through me, and like I referred before, this problem of suspension is not the grievance procedure. It is handled by the foreman, most grievances never get above the first step.

Q. What do you base this statement on?

A. Because we have very little grievances and I know they are resolved by the foreman because they report and they would document the meeting they had with the craftsman or make a note of it or tell us or review with us they resolved some problem that they had, and I did this myself.

Q. Well, let me just clarify this. From what you just stated then, do I understand the P.B.X. foreman or

first line supervisor can adjust grievances?

A. Yes.

[169] Q. (By Mr. Turner) I don't know if the last question was answered. Let me ask the last question over again.

Do I understand correctly that the foremen can ad-

just a grievance at the first step?

A. Yes, he can.

Q. Under what circumstances, if you know?

A. If the foreman had got a complaint of a time charge or overtime not being paid or some nature of that or if he had erroneously did something himself in violation of the contract, he would adjust it.

If he had docked the person without just cause or he would adjust it and pay the person for that, and he would be told to do this as a manager, to use good judg-

ment.

Q. When is he told this?

A. He's told this when he's appointed as a supervisor in his course of training and instruction by his second and third level.

Q. Were you told this?

Q. As a P.B.X. foreman did you ever participate in

any grievances as you defined them?

A. I had grievances brought to me as a P.B.X. foreman, mainly overtime allocations by me either from the steward or from the craft.

I had work conditions brought to me as a foreman.

[178] Q. Did you ever instruct anybody with regard to what they should say or if the first line foreman is by-

passed?

A. I have sent chief stewards back. I sent one back in particular, I recall, on a problem he had, he brought to me as a general problem, and I says, "Is this a grievance or not?" He said he wanted to discuss it and I said, "You better discuss it with the foreman first before you discuss it with me."

I was the plant manager, and he came to me as the

plant manager, the chief steward.

Q. When was this? A. This was in '67.

Q. And you told him what?

A. It's an overtime problem he had.

Q. It's an overtime problem. And who did you tell him to go to?

A. I told him to go back to the foreman.

Q. Which foreman?

A. The foreman he worked with, the foreman that had the problem.

He was the chief steward. He had bypassed the super-

intendent.

Q. Who is "he"?

A. Mr. Edward Ryan, R-y-a-n, I believe.

[186] Q. (By Mr. Turner) In your experience what type of grievance or complaint would the employe bring directly to the P.B.X. foreman?

A. Matters of overtime, of pay agreement, schedule or non-schedule of work, off-hour calls, it wasn't paid for properly by the company, the accounting system, breakdowns.

We would bring this to the foreman.

TRIAL EXAMINER: Are there any complaints or grievances he might have he could take somewhere else?

THE WITNESS: No. His sole contact with the company is the foreman.

[187] TRIAL EXAMMINER: Go ahead.

- Q. (By Mr. Turner) Who determines whether or not the P.B.X. foreman has the authority to resolve the grievance at the first step, if you know?
  - A. He resolves. He knows what his authority is.
- Q. At the first step then what form does the grievance take, if you know, based upon your experience and knowledge?
  - A. It's an informal step.
  - Q. Is it oral or written?
- A. Oral. Very seldom it's written, unless the foreman has some reoccurrence of some problem being developed, a chronic problem, he would keep a document for himself, just an oral discussion.
- Q. Based upon your experience and knowledge, is the authority of the first line foreman changed since you were P.B.X. foreman?
  - A. No, it has not.
  - Q. Does the same authority exist today, if you know?

A. Yes.

Q. Based upon your experience and knowledge, what is the general foreman's role—

Mr. Deady, just to clarify the record, when you are

speaking of foremen, who are you referring to?

A. I am referring to P.B.X. foremen, building cable [188] foremen, construction foreman, plant assignment foremen, all foremen in the plant department who would have people reporting to them.

Q. What development level?

A. That's the first level of management.

Q. Now, what level is the general foreman?

A. The general foreman in the company organization is between a foreman and a superintendent.

Q. Is he in the line directly in line organization?

A. He's a staff organization on the personnel, but he reports to a division personnel supervisor who is the third level.

Q. Based upon your experience and knowledge, what do the general foremen do in each stage of the grievance procedure?

A. They would represent the personnel department of the company knowing the overall or divisional policy. He would be representing the district personnel supervisor.

TRIAL EXAMINER: It seems to be one person named here in appendix A of the complaint who had the title of test center foreman.

What's that?

THE WITNESS: That is the foremen who would have testers who work in the office craft people testing the lines before we would dispatch the repairman, and that's [189] another job title in the maintenance side of the business.

TRIAL EXAMINER: Do you know anything about his general duties?

THE WITNESS: Yes. I have had them working for me as a manager.

TRIAL EXAMINER: What is their duty—how do their duties compare with the installation foreman in

type of authority over employes or participation in grievances?

THE WITNESS: They have the same authority. TRIAL EXAMINER: All right, Mr. Turner.

- Q. (By Mr. Turner) Continuing with that line of questions that have just been asked, let me also ask you to compare the authorities of a P.B.S. foreman with that of a control foreman.
- A. A control foreman would have crafts people working for him, not members of Local 134. He could have both.

He would have dispatchers and girls and he would be working under the superintendent in charge of the clerical functions of a sub-district.

He would maintain records of this nature, clerical function. He'd also, if required, supervise. If he was a P.B.X. foreman and a control foreman, he [190] would supervise P.B.X. installers.

- Q. Comparing the authority with the P.B.X. foreman and control foreman with regard to grievance—discipline?
  - A. Same authority.
  - Q. What about grievances?
  - A. Same authority.
  - Q. What about transferring employes?
  - A. Same authority.
- [193] Q. (By Mr. Turner) Now, beginning with the control foreman and comparing his authority with the P.B.X. foreman, I asked you if the control foreman and the P.B.X. foreman, to compare this authority with regard to assigning work.
- A. The—what would the control foreman assign? He would assign work in his—
- [194] Q. I mean compare this with the P.B.X. foreman.
  - A. Same, similar, he would assign work.
  - Q. What about excusing tardiness?
  - A. He would do this.

Q. With regard to the plant assignment foreman, would you compare his authority with the P.B.X. foreman with regard to discipline?

A. He'd have the same.

Q. What about grievances?

A. The same.

- Q. Transferring employes?
- A. The same.
- Q. Assigning work?
- A. The same.
- Q. Excusing tardiness?
- A. The same.
- "Q. Now, with regard to the building cable foreman— TRIAL EXAMINER: Are there any respects in which they differ in these matters from installation foreman?
  - A. Not that I know of.
- Q. (By Mr. Turner) With regard to the control foreman and plant assignment, the building cable foreman, has their authority, if you know, changed since prior to the strike?
  - A. They have not.

[200] TRIAL EXAMINER: What is this staff function?

THE WITNESS: A staff supervisor. I have them reporting to me now. I have P.B.X. foremen reporting to me as staff supervisors in my present job.

They are card-carrying members of 134. They will return eventually to their job, that's why they are—

Q (By Mr. Turner) That's why they are what?

A. They are staff supervisors. They will return as P.B.X. foremen eventually when their tour of duty is up.

Q. That's what why what?

[201] A. That's why they retain their card.

TRIAL EXAMINER: What do they do as staff supervisors?

THE WITNESS: They would be in charge as a divisional staff function of technical matters relating to the installation of the job, prepare procedures. They would interpret policies and procedures for a general basis for a division or in my case for the whole company.

TRIAL EXAMINER: What is an assistant staff su-

pervisor?

THE WITNESS: Assistant would be the first line,

staff would be the second line.

TRIAL EXAMINER: What is an assistant staff supervisor doing? Advising employes?

A. He does not have employes reporting to him. TRIAL EXAMINER: Would he have any occasion to participate in grievance negotiations or settlements?

THE WITNESS: No.

# [276] CHARLES GERMAIN

was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined, and testified as follows:

#### DIRECT EXAMINATION

Q. (By Mr. Turner) Would you please state your name?

A. My name is Charles Germain. I live at 11001 South Emerald, City of Chicago.

Q. Where are you presently employed?

A. I am employed with Illinois Bell Telephone Company.

Q. And what is your current position?

A. My current position is staff supervisor of general plant personnel staff on wages and working conditions.

[277] Q. Now, would you please describe your current job duties?

[278] A. My current job duties are one of whom is

interpretation of the union agreement and teaching the

union agreement to new foremen.

I have another duty of salary administration for management and craft as far as benefits, holiday allowances, and so forth, when it becomes a union grievance.

My main job is interpretation of union agreements

with management people.

[310] Q. Do you have access to records and figures dealing with the total employe complement and managerial complement?

A. Yes, I do.

Q. Did I ask you to prepare figures showing the number of foremen who are required to be members of Local 134 as compared to the craftsmen under Local 134's jurisdiction as of 1968 and 1970?

A. Yes, I did.

Q. Did I also request information showing the total number of union eligibles and assistant council T-4 as of 1968 and 1970?

A. You did.

Q. Did you prepare those figures?

A. Yes, I did.

[311] Q. Did I also ask you to prepare figures showing the number of Illinois Bell managerial employees as of January, '68, and January, 1970?

A. Yes, you did.

Q. Did you prepare these figures?

A. I did.

MR. TURNER: Would you mark this General Counsel's Exhibit No. 13?

(General Counsel's Exhibit No. 13 was marked for identification.)

Q. (By Mr. Turner) I show you now what has been marked for identification as General Counsel's Exhibit No. 13.

Are those figures that I referred to?

A. Yes, they are.

Q. Would you please explain the terms of those that are referred to in that document that I have given you marked as General Counsel's Exhibit No. 13?

TRIAL EXAMINER: Do you have any other copies

of that at the moment?

MR. TURNER: No.

MR. FITZGERALD: Can I take a look at it?

TRIAL EXAMINER: Off the record.

(Discussion off the record)

[312] TRIAL EXAMINER: On the record.

Q. (By Mr. Turner) Mr. Germain, would you please explain General Counsel's Exhibit No. 13, what you mean by "total company management" and what does that include?

A. Total company management, 1-F, and above the 1-F is parimarily our clerical supervisors, our district instillation girls, and our staff girls who are not union eligible, includes 1-F and above and the 1-E's are district secretaries to the district installation—to the district plant managers, the personnel staffs, schedule 6 are the department heads, personnel section, and that type of employes and all other management people, including the vice president and the president, were all included in this figure.

Q. Mr. Germain, did I also ask you to prepare-

MR. FITZGERALD: Just one on voir dire.

### VOIR DIRE EXAMINATION

Q. (By Mr. Fitzgerald) Are you referring to the last line?

A. Yes.

Q. That includes some secretarial people?

A. Right.

# DIRECT EXAMINATION (Contd)

Q. (By Mr. Turner) Did I also ask you to prepare [313] figures showing the clerical secretarials that are included within that total company management figure?

A. Yes, you do.

MR. TURNER: Mark this for identification Exhibit 14.

(General Counsel's Exhibit No. 14 was marked for identification.)

Q. (By Mr. Turner) Mr. Germain, I show you what has been marked for identification as General Counsel's Exhibit No. 14.

Did you prepare that for me?

A. Yes, I did.

Q. I asked you too-

A. You asked me to exclude all the clerical manager people, 1-E's and 1-F's on schedule 6 and the total without—rather than being for January, 1968, is 80208, with the clerical supervisors included it's 9379 and the 1970 figure without the clerical supervisors is 9107 included is 10544.

Those are the changes.

- Q. And then the figure then on General Counsel's Exhibit 14 do not contain—
  - A. The 1-E's.
- Q.—any secretaries or anybody else than higher [314] management; is that correct?
  - A. That's right. Above 1-E.
- Q. What does that include? You better go up above 1-D.
- A. 1-D would include girls who are supervisors and 1-C's who are supervising other union eligible and it also includes the foremen, the staff people, and so forth, plant assistant in all departments.

That includes the commercial, the traffic, chief operators, that type of thing.

- Q. Going back to General Counsel's Exhibit No. 13, you have here in the middle of the page P.B.X. Local 134, Chicago and suburban, what does that craft figure for 1968 represent?
- A. The craft figure for 1968 represents—suburban, which is the building cable P.B.X. journeymen and the apprentice and building cable apprentice.

The Chicago figure includes the P.B.X. journeymen, building cable journeymen, the apprentice and both P.B.X. and—

Q. What about the foreman figure, what does that include?

A. That includes the first line foreman and the general foreman.

Q. Who do you mean by the first line foreman?

[315] A. The P.B.X. foreman, the building cable foreman.

Q. So that only three classifications of foreman are included within that figure of foreman?

A. That's right.

Q. And those are the ones that are required to be members of the contract under Local 134?

A. That is right.

Q. Is the same true of 1970 figures?

A. The 1970 figure is the same.

I have the suburban craftsmen, suburban foremen, and the Chicago craftsman and Chicago foreman, those in Cook County, 134.

TRIAL EXAMINER: Any objection to 13 and 14?

MR. FITZGERALD: No.

TRIAL EXAMINER: They will be received.

[321] Q. (By Mr. Turner) Do you have access to files listing the first line and general foreman's salary as of July, 1969?

A. Yes, I do.

Q. Did I ask for such a document?

A. Yes, you did.

MR. TURNER: Will you mark this Exhibit No. 16.

(General Counsel's Exhibit No. 16 was received in evidence.)

Q. (By Mr. Turner) Mr. Germain, I show you what has been marked as General Counsel's Exhibit No. 16.

Is this the document you previously referred to?

A. Yes. This document is a schedule 2 of the salary station guide.

MR. FITZGERALD: You may have asked. It's a printed form. Is it prepared for some other purpose?

MR. TURNER: I don't know. Do you want to ask

[322] that on voir dire?

TRIAL EXAMINER: You are offering this into evidence as evidence of what?

MR. TURNER: Evidence of the salaries of the personnel in question, P.B.X. foreman, general foreman.

TRIAL EXAMINER: Now, do you have any ques-

tions?

MR. FITZGERALD: I have no way of questioning the authenticity. I was wondering why it was in printed form.

TRIAL EXAMINER: What does this come from?
THE WITNESS: That comes from the management salary administration files, a copy of that is in every district plant manager—

TRIAL EXAMINER: Any objection to its receipt?

MR. FITZGERALD: No.

TRIAL EXAMINER: It will be received.

## [361] LEONARD FARRELL

was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined, and testified as follows:

### DIRECT EXAMINATION

Q. (By Mr. Turner) Would you please state your name and address for the record?

A. Leonard Farrell, the address is 4019 South Ra-

mond, Brookfield, Illinois.

Q. What is your current position? Are you presently employed?
[362] A. I am presently employed by the Illinois Bell Telephone Co.

Q. And how long have you been employed there?

A. Fourteen years.

Q. And what is your current position?

A. My current position is a P.B.X. installation foreman outside of the jurisdiction of 134.

It's outside of the Cook County area.

[374] TRIAL EXAMINER: As a regular journeyman worker you were in all respects a full-fleged member of 134?

Did your relationship to 134 change in any way [375]

when you became an installation foreman?

THE WITNESS: No, not to my knowledge, except that my authority change and I no longer was responsible to the jurisdiction of the union steward, per se.

[381] Q. (By Mr. Turner) Why did you go back to

work? What led you to go back to work?

A. It's a tough question to answer in a few words. At the inception of the strike, I was told by a fourth level of management that it was completely up to the discretion of the foreman if I chose to work for the telephone company, had a job for him; and if he chose not to work, it would not be held against him in any way.

He would have a job when the strike was over, and it was left completely up to the discretion of the individual foreman. There was no pressure put in either direction; and after this meeting it was the concensus of the foreman, the first line supervisors that I worked

with, to not go to work.

[383] You may continue.

Q. (By Mr. Turner) Mr. Farrell, did you vote with regard to the strike?

A. To my knowledge, I did not.

Q. Was a vote taken?

A. Yes, I believe there was one taken.

TRIAL EXAMINER: All members of 134 were eligible to vote, as far as you know?

THE WITNESS: Yes.

Q. (By Mr. Turner) Mr. Farrell, were there any promises made to you by the company to induce you to come back to work?

## A. No, there were absolutely none.

[390]

#### **CROSS-EXAMINATION**

[404] Q. (By Mr. Fitzgerald) Now, when you returned to work during the strike, you performed what is commonly-known as journeymen work; isn't that correct?

A. And maintenance work, restoration of telephone

service that was out of service.

Q. In other words, do I understand you would mean work of Local 134 and work that falls within the jurisdiction of other local unions?

A. Yes.

Q. But all of this would have been journeymen type work; would it not?

A. Well, except that for the work that I did that was in the maintenance, it would fall out of the classification

of 134 into the repair end.

Q. But it is correct that this is the type of work that the men who were on strike and who held the journeymen's position with the company, whether in 134 or not, would have been doing if they were not on strike? [405] MR. FURLONG: May I make a clarifying suggestion to try to clarify this question.

The term "journeyman" is usually more generally associated with the 134 people and with the non-134 people, I think, and I think that's what is confusing the witness.

TRIAL EXAMINER: Well, the question in brief, Mr. Farrell, is you were doing production work as distinguished from supervisory work during that period; correct?

THE WITNESS: Yes.

Q. (By Mr. Fitzgerald) That's exactly the point. This was the work that people on strike would have done if they weren't there; is that correct?

A. Yes.

[409] Q. (By Mr. Fitzgerald) Mr. Farrell, after reading the form stateemnt which is in evidence as Local Exhibit No. 7, did you introduce any evidence or testimony denying the fact you did the work of journeyman electrician during the strike?

A. No. At the time of the hearing I did not deny or admit to working during the strike. I just read the

statement.

Q. Was this statement prepared and furnished to you by the association; that is, the Bell Supervisors?

A. Yes.

- Q. After you received your notice that you were found guilty and subject to a fine or assessment, did you then appeal this through the local or through the international union vice president's office and then up to the president's office?
- A. Yes. I don't remember the exact procedure but I did appeal it all the way up.
- Q. You followed the procedure and again their assistance was furnished to you by the association in this regard?

[410] A. Yes, it was.

- Q. Now, after the international president denied your appeal did you then pay the fine?
  - A. Yes, I did.
- Q. and did you submit vouchers or a voucher at least to the company to be compensated for this fine; that is, to have the company compensate you for your paying the fine to the local union?
- A. I don't remember the exact procedure of how it was done, but the company did ultimately pay the fine.
- Q. Let me show the document furnished by Mr. Furlong from the company and it's entitled "Expense Voucher" and appears to have the signature "Leonard F. Farrell."
  - A. Yes, that's my signature.
- Q. Does that refresh your recollection that you signed and submitted a document of that type, at least one?

A. Yes.

Q. Now, this document bears the total of \$380.00, but did you receive the full \$500.00 which was the amount of the fine from the company?

A. To the best of my knowledge, yes.

[421] Q. Now, you testified that you were in a test center foreman job category at the present time; is that correct?

A. No, no, that's not correct. I held that position for approximately a year between 1969 and the year of 1969.

Right now the P.B.X. installation foreman is outside the jurisdiction of 134.

[422] MR. TURNER: Mr. Trial Examiner, I want to clear up a few things before we get into the next witness. First of [423] all, I want to offer the stipulation that all those persons named in appendix A of the complaint, with the exception of a Mr. Brakeman, were fined the sum of \$500.00 and those persons named in appendix B of the complaint were fined \$1,000 apiece.

TRIAL EXAMINER: What was Mr. Brakeman

fined?

MR. TURNER: \$100.00.

TRIAL EXAMINER: Now, this, of course, is what they were fined by the local and subsequently some of the fines were set aside; is that right?

MR. TURNER: Well, the evidence—the stipulations that we made at the beginning of the trial are still rele-

vant to the-

TRIAL EXAMINER: Do I understand the proposed stipulation, Mr. Fitzgerald?

MR. FITZGERALD: Yes.

TRIAL EXAMINER: Is it satisfactory? MR. FITZGERALD: It is satisfactory.

TRIAL EXAMINER: All right. That stipulation is received.

# [429] JAMES B. HOWE

was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined, and testified as follows:

## DIRECT EXAMINATION

Q. (By Mr. Turner) Would you please state your name and address for the record?

A. James B. Howe, H-o-w-e, 101 Payton Lane, Chi-

cago Heights.

Q. Mr. Howe, where are you presently employed?

A. At the Illinois Bell Telephone Co.

Q. And how long have you worked there?

A. Fourteen years.

Q. And directing your attention to the period of January through December of 1968, what was your position at that time, what were your positions, if there were more than one?

A. Well, I hold various positions since being promoted

to manager at Illinois Bell.

For example, I was promoted in 1966 to P.B.X. foreman and 1967 I was made a control foreman central division.

Q. And in January this year assistant staff supervisor in central division.

[430] TRIAL EXAMINER: What were you at the time of the strike?

THE WITNESS: At the time of the strike I was control foreman.

[433] Q. (By Mr. Turner) Mr. Howe, did you work during the strike?

A. Yes, I did.

Q. Would you please tell us why you worked during the [434] strike? If you know.

MR. FITZGERALD: Objection.

TRIAL EXAMINER: Overruled. He can answer.

THE WITNESS: Mainly because I am management and management personnel worked during the strike.

Q. Could you elaborate at all on this?

A. Well, I was working for my employer, serving my employer.

Q. Do you receive any pension or insurance, or any-[435] thing of that kind?

A. When that time arises, I would receive one, yes,

one that I paid for.

Q. What about insurance?

A. Yes.

Q. Do you know if you contribute anything towards the pension or insurance?

A. I do.

Q. In a momentary nature?

A. Yes, as a-

Q. And when do you do this?

A. Once every three months.

## [440]

#### **CROSS-EXAMINATION**

Q. (By Mr. Fitzgerald) Now, you testified that between 1967 and November, 1968, you held the job category of control foreman in the central; is that correct?

A. In the sub-district office at 180 North Dearborn,

Yes.

Q. Now, this job category of control foreman is not included within the Exhibit A of the contract between the union and the employer; is it?

MR. TURNER: I object.

MR. SCHREIBER: You have to give him the exhibit.

MR. TURNER: It speaks for itself.

MR. FITZGERALD: I think it's important—I know it's not, but I think it's important.

TRIAL EXAMINER: Can you stipulate that it's not?

MR. TURNER: I will stipulate.

MR. SCHREIBER: the document is in evidence.

Q. (By Mr. Fitzgerald) You understand or you knew, Mr. Howe, that your position of control foreman was one that was not within the collective bargaining

agreement between the company and Local 134 during the time period that you held this job; is that correct? [441] A. I wasn't aware of it.

Well, were you of the opinion that you had to maintain your card in Local 134 during this time period

when you served as control foreman?

Yes A

Q. Who told you that?

A. My district plant manager.

Q. Who was this man?

My district plant manager was Mr. E. P. Deady. A.

Did Mr. Deady tell you why you had to keep your Q. card up?

He didn't elaborate other than I would keep my

card.

[445] Q. (By Mr. Fitzgerald) Now, prior to May 8th did you attend a meeting where other company officials talked to you about the strike or the pending strike that might take place?

A. Telephone company officials?

Yes.

[446] A. I believe so.

And did they give you in essence the choice of working or not working during the strike?

A. At the meeting that I attended I was told that I would be expected to work when the company was struck.

Q. Who told you this?

Mr. Deady, my district plant manager.

Did Mr. Deady have in his possession a paper from which he read something to you?

A. Not at the time.

Does he talk to you off the cuff, so to speak, without any papers, or anything in his hands at the time he talked to you?

A Yes.

Q. Did he tell you what, if any, action the company would take against you if you failed to report to work?

A. No.

Q. Did he tell you that the company would not take any action against you; that is, adverse to you, if you honored the strike?

A. He may have mentioned that, yes.

Q. Give us your best recollection? Did he say that?

A. I think he said something to the effect that if I went out on strike, my job would still be there when [447] I came back, something to that effect, yes.

Q. And by your job you understood to mean the con-

trol foreman job; right?

A. Yes.

- Q. And did you then, when you chose to go out on strike, understand that you had the option to continue working or remain on strike, as far as the company was concerned, as related to you by Mr. Deady?
  - A. Yes.
- Q. And then you returned to work approximately two weeks after May 9th of your own choice?

A. Yes, sir.

[448] TRIAL EXAMINER: What sort of work did you do when you came back during the strike?

THE WITNESS: Installed telephones.

Q. (By Mr. Fitzgerald) Would that be work that a P.B.X. installer who is a member of Local 134 would have done?

[449] A. Yes.

Q. If you had not struck?

A. Yes, sir.

[452] Q. Did you subsequently pay the fine to Local 134?

A. Yes, sir.

Q. And did you receive the \$500.00, which is the amount of the fine, from the Illinois Bell Telephone Co. in order to pay the fine?

A. I paid part of the fine myself, about \$160.00 of it, and then I was reimbursed for the money that I paid.

Q. Well, did you pay the whole \$500.00?

A. Yes.

Q. And were you reimbursed by Illinois Bell for the entire \$500.00. A. Yes.

[454] MR. FURLONG: I wonder if we could save some time if the parties will agree to stipulate that to the extent that employes subsequent to the jurisdiction -supervisors subject to jurisdiction of 134 paid fines and reported the fact to the company and the company did reimburse them.

Is that satisfactory, Mr. Fitzgerald? MR. FITZGERALD: I'm sorry.

TRIAL EXAMINER: Mr. Furlong has offered to stipulate that, to the extent that Local 134 fines supervisory employes of the company and the employes reported that [455] to the company, the company reimbursed those supervisors, as I understand the term, for the amount of those fines.

Is that satisfactory?

MR. FITZGERALD: As far as it goes and, if I might, and I think this shows from the document tendered that it was not limited to supervisory.

In other words, journeymen who were fined also had their fines paid for them by the company. I will stipulate

that.

TRIAL EXAMINER: That's not part of the stipula-

tion proffered by Mr. Furlong.

If you want to make an additional stipulation, you may propose it, but, insofar as Mr. Furlong's statement is concerned, are you prepared to stipulate to the truth of that statement?

MR. FITZGERALD: Yes.

TRIAL EXAMINER: All right. That stipulation is received.

#### [459] REDIRECT EXAMINATION

Q. (By Mr. Turner) Mr. Howe, with regard to the strike, was there any statement made to you by any union representative as to any action that would be taken if you did go back to work?

A. Yes.

Q. And when was this?

- A. Just—wait a minute. I have to qualify that. Prior to the strike.
  - Q. Where was this?

A. At the union hall.

Q. And who was present?

A. A lot of foremen were present, P.B.X. foremen.

Q. And who else, if you know?

A. Mr. Cunningham.

[460] Q. Who is Mr. Cunningham?

A. He's the business agent for 134.

[461] Q. (By Mr. Turner) Would you continue and tell us who was present?

You stated there were P.B.X. foremen there and Mr.

Cunningham?

A. Yes.

- Q. I believe Mr. Fitzgerald stated that he was present? Is that so?
  - A. If he says so.

Q. Did you see him?

A. I don't recall him being there.

Q. Do you recall what was said at that meeting?

A. Well, there was a question raised from the floor, something to the effect that if the foremen worked during the strike, would they be fined, and it was stated that they would be.

Q. Who stated that they would be?

A. Mr. Cunningham.

- [463] Q. (By Mr. Turner) Is one of the reasons you kept, if not the major reason you kept the union card the fact that you knew there is a likelihood of going back to P.B.X. foreman work?
  - A. Yes.
- Q. What position did you hold when you first became a member of the union?
  - A. P.B.X. apprentice.

Q. Now, is installation work the only type of work you performed during the strike?

A. No, sir.

Q. What other type of work did you perform?

A. I acted in the capacity of a supervisor to other people who were performing work during the strike.

[467] Q. Yes—were you a member of the union because you voluntarily wanted to be or because you were required to be by contract?

A. Because I was required to be by contract.

MR. CHRISTENSEN: Thank you very much. That's all.

TRIAL EXAMINER: Mr. Fitzgerald, anything further?

### RECROSS-EXAMINATION

Q. (By Mr. Fitzgerald) Well, just on this point: now that you are—when you were a control foreman, you did not voluntarily retain your membership? You did so because Mr. Deady said you had to; right?

A. All P.B.X. installation foremen that I know of in central division, whether they are control foremen or assistant staff supervisors, are still carried as P.B.X. fore-

men on the company roster.

- Q. And your testimony is that your understanding is the company interprets the contract to require an assistant staff supervisor as control foremen to retain their membership in the union within the general title of either P.B.X. foreman or building cable foreman?
- A. They require P.B.X. foremen to maintain their cards in the union.
- Q. Well, you were not a P.B.X. foreman when you were a control foreman; right?

A. All right.

[468] Q. Now, when you supervised others who worked during the strike, were these the people who were sent from [469] around the country in to work on Illinois Bell work as craftsmen?

#### A. Some of them.

[470] Q. All we want is your honest testimony.

Now, is it your testimony that Mr. Cunning told the gropu that they absolutely would be fined if they worked during the strike?

A. Yes.

Q. Did he guaranee it to you that you would be fined if you worked on the strike?

MR. SCHREIBER: I object. Why don't we get what Cunningham said, not the witness's conclusions.

- Q. (By Mr. Fitzgerald) Do you recall Mr. Cunning-ham's words?
- A. What I do recall is someone had asked if the foremen would be fined.
  - Q. What did Mr. Cunningham say?
- A. Mr. Cunningham said they would be fined. Someone else asked how much and he didn't know.
- Q. Mr. Cjnningham in response to a question, or otherwise, said that he was certain charges would be filed against someone who worked?
  - A. I believe that.
  - Q. Your answer is yes?
  - A. Yes.
  - Q. Do you recall if that question was asked of him?
  - A. I believe the question was asked.
  - Q. Did you ask it?

[472] TRIAL EXAMINER: Mr. Howe, will you please tell me what you recall Mr. Cunningham saying at this meeting, everything you can recall him saying?

[473] A. Well, the only thing that I can recall him saying, one someone asked a question as to whether or not the foreman would be fined if they worked during the strike.

His answer to that was yes.

#### RICHARD A. HAWKINS

was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined, and testified as follows:

### [474] DIRECT EXAMINATION

Q. (By Mr. Turner) Please state your name and address for the record.

A. Richard A. Hawkins, Jr., 2119 North Route 47, Woodstock, Illinois.

Q. And where are you presently employed?

A. Illinois Bell Telphone Co.

Q. How long have you worked there?

A. Going on 22 years.

Q. And what is your current position?

A. District installation superintendent.

[476] A. 1962 until 1966.

TRIAL EXAMINER: Let me ask a question or two here.

You were last P.B.X. foreman some time in 1966?

THE WITNESS: Correct, sir.

TRIAL EXAMINER: You then became an assistant staff supervisor?

THE WITNESS: Correct, sir, and-

TRIAL EXAMINER: And you remained an assistant staff supervisor through the time of the strike?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And after the strike you continued as an assistant staff supervisor?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And thereafter you were promoted to your present position?

THE WITNESS: Correct.

[477] TRIAL EXAMINER: You never have anything to do with any grievances they might have?

THE WITNESS: As assistant staff supervisor, no. TRIAL EXAMINER: Go ahead.

Q. (By Mr. Turner) As district installation superintendent what jurisdiction are you in at this point, as far as a local union?

A. At this point I am with 336 outside of the juris-

diction [478] of 134.

[479] A. And I believe Mr. Truder.

Q. Who is Mr. Truder?

A. Division plant manager at that time for north suburban area.

[480] TRIAL EXAMINER: You tell us what you remember was said there and who said it, to the best of

your recollection?

THE WITNESS: I asked Mr. Winks if we came back to work, would the telephone company guarantee us our jobs back, or if we didn't go back to work, would we get our jobs back, would there be no hard feelings, et cetera, and so on.

He guaranteed this would be so.

MR. FITZGERALD: This "et cetera and so on" is just not proper testimony.

TRIAL EXAMINER: It will suffice. Go ahead.

THE WITNESS: We also drew out of this rather lengthy meeting that the telphone company was not going to order us to come back to work. They would like to have us come back to work.

[486] Q. (By Mr. Turner) Were you fined for working during the strike?

A. Yes, sir.

Q. And what was the total amount of fines assed to you?

A. \$1,000.

Q. Do you know what this fine was for?

A. Trying to form a-

MR. FURLONG: He already said it was for working during the strike.

MR. FITZGERALD: Is that an objection?

MR. TURNER: Well, let me withdraw that ques-

tion, please, and ask this question:

Q. (By Mr. Turner) This \$1,000 fine, has there been any attempt in the last month, if you know, by Local 134 to collect this fine from you?

A. Yes.

Q. And how do you know this?

[487] A. I was served a subpoena, stating the fact of the case, that I was being sued for \$1,000 which I hadn't paid.

Q. Do you know where you were being sued?

A. Circuit Court.

Q. Was this the state Circuit Court of Illinois?

A. I imagine.

MR. TURNER: Can we get a stipulation on that, Mr. Fitzgerald?

MR. FITZGERALD: Sure. It's the Illinois Circuit

Court.

# [499] CROSS-EXAMINATION

- [501] Q. Did you attend prior to the strike a meeting where the question of whether you would work or not during the [502] strike was discussed by some higher company official? I'm talking about a meeting other than the one you testified to at Holiday Inn?
  - A. Yes, sir.
- Q. And you were here when the other witnesses testified this morning?
  - A. Basically the same.
  - Q. They were given the option-

TRIAL EXAMINER: The answer was "yes"?

THE WITNESS: (Witness shakes head).

Q. (By Mr. Fitzgerald) And this is pretty well what was told to you again at this meeting at the Holiday Inn or to the whole group, I should say, in response to your question that Winks told the group that they could return

to work if they wanted to; but if they did not return, there would be no hard feelings, I think, is the way you put it, is that correct?

A. Correct.

[507] Q. Now, you testified that you-strike thatthat the association solicited only supervisors during the strike and not journeymen; is that correct?

A. Correct.

Q. And the solicitation was in the form of letters sent out to these various foremen and general foremen; is that correct?

MR. TURNER: Objection. I don't know exactly if the question is referring to testimony or what now, because-

MR. FITZGERALD: I think he indirectly testified they solicited.

TRIAL EXAMINER: What form did this solicitation take? Letters?

THE WITNESS: Form of letters, sir.

[508] I show you what is in as Local 134 Exhibit 5. Was this the first letter you sent out, the association sent out, rather?

THE WITNESS: Along with the articles of associa-

tion, that letter went out.

Q. (By Mr. Fitzgerald) It wasn't signed? It was as this copy shows?

A. Yes.

- Now, to whom was this first mailing sent; do you Q. recall?
  - To all 134 supervisors whom we were aware of. A.

Q. You say who you were aware of?

A. Aware of.

Q. Would it have been the total complement of 150, approximately?

A. Hopefully.

Q. Do you know if not all, almost all were?

A. Almost all, I would say.

#### DONALD L. McCLENNON [523]

was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined, and testified as follows:

## DIRECT EXAMINATION

Q. (By Mr. Turner) Would you please state your name and address for the record?

A. Donald L. McClennon, 7955 North Tripp, Skokie,

Illinois.

Q. Mr. McClennon, where are you presently employed?

A. North suburban area office.

Q. What company?

A. Illinois Bell Telephone Co.

Q. And how long have you been employed there?

A. For the telephone company?

Q. Yes.

A. Twenty-four years.

Q. Directing your attention to the time of the strike in 1968, did you work during the strike?

A. I did.

Q. Were you fined?

A. I was.

Q. How much were you fined?

A. \$1,000.

- [524] Q. What is your current position, Mr. McClennon?
  - A. General foreman, north suburban area.
  - Q. How long have you held that position?

A. Since April 1, 1968.

Q. (By Mr. Turner) Mr. McClennon, as general foreman [525] do you ever participate in the grievance procedure?

A. I do, yes.

Q. And would you please tell the court based upon your experience what role you play in the grievance procedure?

A. The role I play?

Q. When you participate in the grievance procedure, who do you represent?

A. I represent the Illinois Bell Telephone.

TRIAL EXAMINER: How does a grievance come be-

fore you?

THE WITNESS: It's usually brought up from the craft through the foreman and normally the district installation superintendent to me.

TRIAL EXAMINER: You participate at a higher level than any of these gentlemen in the resolution of

these grievances?

THE WITNESS: Normally, yes.

[526] Q. Have you ever participated in grievances involving Local 134?

A. I have, yes.

Q. How many types of these grievances have you participated in? Just give me an estimate, if you will.

A. How many types?

Q. Yes, or how many grievances involving Local 134 [527] and since January 1, 1968, if you can enumerate?

A. I would strictly be making a guess and I would say possibly between 40 and 50.

# [528]

# CROSS-EXAMINATION

[531] Q. (By Mr. Fitzgerald) Now, all 40 or 50, of these were not at the district plant manager level; were they?

A. No.

Q. Do you know how many representatives are on that level, in which you were a participant, I mean?

A. I would be guessing and I would say only a couple

of them at the most.

A good portion of them were settled the first step.

[535] Q. You weren't ordered by anyone to keep your card in 134?

A. No.

Q. You voluntarily chose to remain a member while you were assistant staff supervisor?

### A. I did.

## [536] REDIRECT EXAMINATION

Q. (By Mr. Turner) Why did you keep the card then if you weren't told to keep the card?

[536] Q. (By Mr. Turner) Why did you keep the

card then if you weren't told to keep the card?

A. Actually I tried to get a withdrawal card and I asked, as I mentioned before, I did ask Mr. Dwyer about it and he suggested that I keep it.

Q. Did he say why?

A. He claimed it wouldn't be worth the—wouldn't be worth the while to take a withdrawal and then at the same time, as far as the benefits were concerned, it would be worth my while to keep it.

Q. You stated that you are no longer a member of

the union?

A. I'm not, to my knowledge.

Q. Are you still over the jurisdiction of Local 134 craftsmen?

A. I am as far as the job is concerned, yes.

# [548] CHARLES GERMAIN

was recalled as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been perviously duly sworn, resumed the stand, was examined, and testified further as follows:

# [552] CROSS-EXAMINATION

Q. Are you also aware that the company policy has been since the strike to promote to the position of foreman, general foreman, and district installation superinendent [553] employes who honored the picket line and stayed out on strike?

# A. Would you repeat that?

(Record read)

THE WITNESS: That is true.

Q. (By Mr. Fitzgerald) Three of the five general foremen, all of whom have been promoted since the strike, were foremen who stayed out on strike; were they not?

I am talking specifically about Mr. Quinn, Mr. Wolf,

and Mr. Strange?

A. They were promoted to general foreman. I have no personal recollection if either one of them worked during the strike. I was assigned at Hyde Park during the strike. To the best of my understanding, they did not work

during the strike.

Q. Well, I don't mean to embarrass you but Mr. Furlong produced the document in response to the subpena that that indicated the very fact that these men were not promoted.

MR. SCHREIBER: Let's not argue.

THE WITNESS: I don't know.

MR. FITZGERALD: Could we stipulate that and avoid another witness?

MR. FURLONG: Yes, sir. I presume this is the [554] truth. They are all here.

Is this stipulation correct?

TRIAL EXAMINER: Now, Mr. Furlong, let's not be quite as informal as all that.

MR. FURLONG: I beg your pardon.

MR. FITZGERALD: I could call them as witnesses.

TRIAL EXAMINER: I think it will not be necessary. Mr. Furlong has indicated already at some time later this morning Mr. Furlong desires to withdraw from that stipulation.

I will hear from him.

MR. FURLONG: I will stipulate it now and I don't care whether they worked or not.

TRIAL EXAMINER: It is stipulated. You may con-

tinue.

[561] Q. Well, are you aware that in 1966 the Local 134 made demands upon the company for wages for the foremen and general foremen?

A. No, I'm not aware of that.

Q. Well, were you made aware of any of the wage demands made in 1966 negotiations?

A. Only for the craft employes? That's all I re-

searched.

Q. Well, who would research demands made for fore-

men and general foremen, if any were made?

A. This would be researched by the A.B.P. personnel group on management salaried administration, and I have no access to those records.

Q. What is a A.B.P. men?

A. Assistant vice president of personnel. It's part of his organization.

Q. That's Mr. Boyles, the assistant vice president,

is it, personnel?

A. He's an assistant vice president of labor relations.

Q. Now, I show you volume 2 of the books that were [562] in evidence and withdrawn and which you have had a chance to look at this morning and this is an unnumbered page, but it says "policy administration stand," and I direct your attention to promotional increase-computations schedule No. 2, foremen, where it says, "The exact amount derived from finding the desired promotional increase per cent to the monthly rate prior to the promotion, not to exceed the 22 per cent maximum increase limitation."

This is what you use as part of your instruction to the class; is that not correct?

A. That is true.

Q. And this is relating to the company policy that the foremen will receive the wage increase based on a percentage computed above the journeyman rate; is that correct?

A. This is the current percentage given to a craftsman on his basic rate when promoted to first line foreman.

Q. Now, this would be sort of the standard or base rate for a foreman, is that correct; that is, excluding merit increases?

[563] THE WITNESS: The policy is that when a P.B.X. foreman is promoted or any foreman to 1 (a); that is, the supervisor who has crarts overtime people working for him, would be given a 22 per cent tax increase at the time of promotion based on his current rate at that time and that is where a foreman is promoted to 1 (a) directly.

Q. (By Mr. Fitzgerald) Now, when the crafts receives a negotiated wage increase, necessarily the base rate for the foremen and general foremen would increase;

would it not?

A. If it changes the craft.

THE WITNESS: If the wage increase at the time of promotion had increased the craft in pay, he would get 22 per cent on his current base rate, whatever that might be.

Q. (By Mr. Fitzgerald) Well, let's take a foreman who is in position of a foreman, when the negotiated wage increase for craftsmen goes into effect, then is it company policy to raise the basic foremen's rate to stay [564] ahead by this percentage of the craftsmen?

A. No, it is not. The foremen's salary does not change based on wage negotiations for the craftsmen.

Q. Well, then you are saying that a man promoted up from craftsman to foreman could get a higher rate than a man who had been in the foreman's job prior to the wage increase?

A. That is true. That is true.

[569] MR FITZGERALD: Well, I want to make the point that our argument in the area of the adjustment of grievances is that the company has not followed for years the steps outlined in the contract as far as grievances are concerned.

Now, the reality is that first line foremen don't have and don't exercise the discretionary judgment which would appear from the contract, and I am certain [570] it is in evidence, the contract is in evidence and cer-

tainly going to be referred to in that regard.

MR. FITZGERALD: Now, 18—and Mr. Deady's testimony and, as I understand, Mr. Germain's testimony all go to show that what we are arguing is the fact that the first line foreman doesn't resolve grievances in any meaningful way.

[572] Q. (By Mr. Fitzgerald) That's not a grievance

then; right?

A. It's not necessarily. It could be a grievance if the foreman could not settle it with the craftsman and therefore it could become a grievance which would have to go all the way through channels, but, as far as I am concerned, my personnal opinion is that there is a grievance between the craftsmen and the supervisor about being short two hours in his pay check.

Q. Well, you are saying now what you hand out to these foremen in your class states a matter other than

your own opinion on what is a grievance; right?

MR. SCHRIEBER: Objection TRIAL EXAMINER: Overruled.

Do you understand the question, Mr. Germain?

THE WITNESS: I think I understand the question. The mere fact that an employe has to communicate with a supervisor does not necessarily mean it's a grievance; however, if it involves company policy or practices, there would be a grievance, and the day-to-day job discussion wouldn't necessarily be a grievance, and I fail to see the fine line of distinction between telling a man what to do and discussing a company policy.

I won't consider that a grievance when a man has asked the foreman, "How do you do this?" I don't [573]

consider that a grievance.

Q. What you consider a grievance is when there is a basic problem of company policy or contract interpretation; right?

MR. SCHREIBER: Objection, calling for a conclu-

sion.

TRIAL EXAMINER: Overruled.

THE WITNESS: I would say that is true.

[574] TRIAL EXAMINER: Mr. Germain, every time a craftsman has some complaint or problem related to his work, it may be as pay or his hours or his assignment and he takes it up first with his foreman?

Is that your understanding of the term the "presenta-

tion of a grievance"?

A. In my interpretation it well could be.

Q. Then what is the meaning of the expression in your book about how the foremen can settle something before it becomes a grievance?

Never mind what you might have meant. You tell me what you mean.

A. I would say that the grievance as we outlined it in this note that we wanted to emphasize the fact that any problem could become a grievance as far as the foreman is concerned where he feels if this went without an answer, that it would go through channels of union organization and come up to our level as a formal written grievance.

TRIAL EXAMINER: Are you telling me that when you [575] said before it becomes a grievance there you meant before it becomes an aggravated grievance or griev-

ance at higher level?

THE WITNESS: That was our intent.

[580] Q. That is article 22 and it bears that very title; doesn't it? Promotion, dismissal, and suspension.

A. This is true.

Q. Now, in your performance of your job, would you have occasion to deal with people who are being terminat-

ed from the company; that is, their cases?

A. I'm involved only if there is a grievance at our level. I am also involved in the forms that are sent [581] through to the employment department, which happen to come through my desk.

That's the 154 form. Basically that's it.

Q. Now, if an employe were to be terminated for, say, thievwy, you would receive a report from what you call the security department of the company; would you not?

A. It would come to our office, primarily things of that nature, to go direct to either Bill Muir, my immedi-

ate supervisor, or Mr. Paul Downing.

[590] Q. Now, one of the two documents which you have produced relating to Local 134 is the letter signed purportedly by Mr. Howe to a Mr. Fioretti, distrinct installation superintendent; is that correct.

A. This is the document I submitted.

Q. And the second document you submitted is this form report signed by—maybe you can read his name—he's a building cable foreman. It's illegible.

A. Joseph Hubbard.

Q. And these two documents contain with the attachment to the second document showing a list of employes' absenteeism, contain a narration of facts regarding that employe situation; don't they?

A. That is correct.

[592] TRIAL EXAMINER: Let the record show the witness is holding in his hands certain terms of the company dealing with the termination of Employe Covington consisting of three pages, which for convenience purposes we will identify as 134's Exhibit 12, the first 2 pages.

MR. FITZGERALD: There are copies available?

TRIAL EXAMINER: Consisting of a form that was filled out in the last page consisting of a labeled record of attendance.

(Local ler's Exhibit No. 12 was marked for identification.)

TRIAL EXAMINER: All right. Go ahead, please.

THE WITNESS: This form here is a report which is put in the employe's personnel file, which when the employe leaves the service of the company, this record is kept and whenever the employe should return or reapply for a position with the company, this document is then used to determine whether we would consider re-employing this employe.

The security information is a narrative of what took place in their investigation and I see personally no comparison with that in this letter.

MR. FITZGERALD: Are not the reports, when they are from the foremen or from the security department [593] used to determine whether an employe will be terminated or not?

MR. TURNER: Objection.

TRIAL EXAMINER: Overruled.

THE WITNESS: They could well serve the same type of purpose, but the security department report goes

to the management people for them to make the decision and then it will be followed with this type of a report showing the employe terminated.

TRIAL EXAMINER: Is the security department report made pursuant to the complaint of an employe?

THE WITNESS: No, it is not. TRIAL EXAMINER: Go ahead.

Q. (By Mr. Fitzgerald) What did you mean when you said management people make—

A. Security report normally goes to the general per-

sonnel staff, which is our staff.

Q. That is where you work?

A. That is where I work. It could, however, also go direct to the district plant manager or the division plant manager, depending on the type of report and what is involved.

Q. And these two cases concerning Mr. Covington and apparently both Mr. Mol, M-o-l-k, and Mr. Woods are the only two notes which you have found in all your files [594] eminating from foremen; is that correct?

TRIAL EXAMINER: 134 foremen.

MR. FITZGERALD: 134.

THE WITNESS: May I clarify that? These are the only cases where I had documents signed by the P.B.X. foreman; however, there were other cases which might have involved P.B.X. which were documented by the district level or division level.

I was not required to bring such documents, only those signed by a foreman.

[595] Q. (By Mr. Fitzgerald) And the two are the only ones for foremen?

A. These were the only ones that have foremen documented statements. This is true.

Q. (By Mr. Fitzgerald) Now, the paper signed by Mr. Howe refers to P.B.X. journeymen, Mr. Molk and Mr. Woods; right?

TRIAL EXAMINER: All right. This is the docu-

ment—I think we can mark this one then as your Exhibit 13 for identification purposes.

[596] TRIAL EXAMINER: This is a document that Mr. Howe as P.B.X. foreman signed.

TRIAL EXAMINER: And who is it addressed to?
THE WITNESS: His district installation superin-

tendent, Mr. Fioretti.

TRIAL EXAMINER: That will be called for purposes of identification only Union's Exhibit 13, 134's Exhibit 13.

Q. (By Mr. Fitzgerald) You did answer that it concerned a recommendation from Mr. Howe regarding Mr. Molk and Mr. Woods; is that correct? Take your time to look at it, particularly the footnote that talks about recommendation.

[597] MR. FITZGERALD: You have read it and it recommends at least Mr. Howe's recommendation that these men be terminated; is that correct?

THE WITNESS: It is my recommendation that they

be terminated, Mr. Howe.

Q. Over his signature?

A. That is right.

Q. And these men were not terminated; were they? In fact, they are still on the payroll today; aren't they?

A. To the best of my knowledge, they are.

## [614] REDIRECT EXAMINATION

[615] Q. Now, if you know, what authority does the company give to the first line foreman to settle or re-

solve this grievance?

A. The first line foreman has the authority to resolve the grievance and to, if it is a grievance, as to discipline or if it is a grievance on pay or if it is a grievance on work assignment, the first line foreman will tell the craftsman, "You will perform those duties," and if you wish to grieve them, you can file a grievance [616] with your steward.

Q. Who would the steward go to?

A. The steward would then go back to the foreman.

Now, did you tell this to your class? Q.

Yes, I did.

TRIAL EXAMINER: Is it possible that the steward could talk the foreman out of his decision so that the matter would go no further?
THE WITNESS: That is true. It could happen and

it does quite often.

#### FRANK J. CUNNINGHAM [643]

was called as a witness by and on behalf of Local Union No. 134, and having been first duly sworn, was examined, and testified as follows:

## DIRECT EXAMINATION

Q. (By Mr. Fitzgerald) Will you state your name and business address?

A. Frank J. Cunningham, 600 West Washington, Chi-

cago, Illinois.

What is your present occupation?

A. Business representative, Local Union 134, International Brotherhood of Electrical Workers.

- [644] Q Are you a member of the executive board and did you sit in on the trials for the foremen and general foremen who were charged for working during the strike?
  - A. Yes, I did.
- Q. Did you also sit in on the trial board for those who were charged and tried but whose names do not appear on Exhibit 8?
  - A. Yes, I did.
- Q. Now, can you tell us what happened to those members who were charged with working during the strike and who testified to the executive board that they did not work at the struck work during the strike?
  - A. The charges were dropped. It was explained to

the charging party that there was no violation of the

agreement.

Q. Now, was a member, at least one member other than the foreman or general foreman, fined by the union for performing struck work during the strike?

A. Yes.

[645] TRIAL EXAMINER: You offer to prove by this witness what?

MR. FITZGERALD: That if he were to testify, he would state that a non-foreman or general foreman, a man who held the capacity of journeyman was fined when that man did not deny working at the struck work during the strike.

TRIAL EXAMINER: That offer of proof will stand

in the record.

MR. CHRISTENSEN: I do not object to it.

[646] MR. FITZGERALD: Now, one additional problem; that is, an offer of proof, and maybe I will offer to prove a second aspect, that this man, Mr. Shevlin, S-h-e-v-l-i-n, had his fine paid by the company.

TRIAL EXAMINER: That last offer of proof may

also stand in the record.

MR. FITZGERALD: I must ask one question in another area, because if I didn't—

TRIAL EXAMINER: Go right ahead.

Q. (By Mr. Fitzgerald) Mr. Cunningham, were you present at the meeting that the local union held May 7, 1968?

A. Yes, I was.

Q. And who was present other than yourself representing or speaking from the dias?

A. You were, Robert Fitzgerald, attorney for thee Local Union 134.

Q. Now, in the course of that meeting did the question come up as to what could happen if men in the position of foremen, general foremen worked at struck work during the strike?

A. Yes, it did.

Q. And what was the response and who gave it?

A. My answer to the question was that the bylaws of the local, the constitution of the Brotherhood would be upheld, charges would be preferred against any member [647] for working, the trial board, the executive board would sit as the trial board, clear the charges and discipline the case.

Q. To your knowledge, have any men promoted to the job of district installation superintendents since the strike who were members of the local union who also recognized the strike and did not work during the strike?

A. To my knowledge, there's two.

Q. What are their names?

A. Mr. Butler in south suburban area and Mr. Seneca in north suburban area.

[647]

## CROSS-EXAMINATION

[648] Q. That's not what I asked you. Every mar brought to trial.

MR. FITZGERALD: He's arguing with the witness

and it's only the second question.

TRIAL EXAMINER: The question, Mr. Cunningham was whether with every man brought to trial some charge had been lodged against him for working.

Is that it?

MR. CHRISTENSEN: By a member of the union and in most instances by one of your union representatives; isn't that correct?

THE WITNESS: No. I can't answer that.

Q. (By Mr. Christensen) Were men brought to tria without charges being levied against them?

A. No, sir.

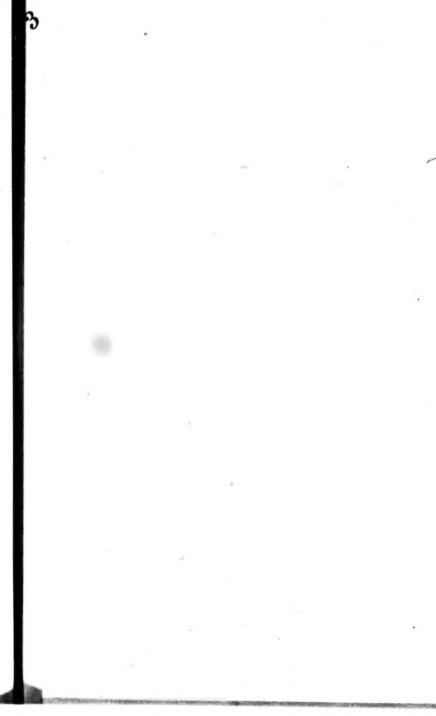
TRIAL EXAMINER: Who filed the charges?

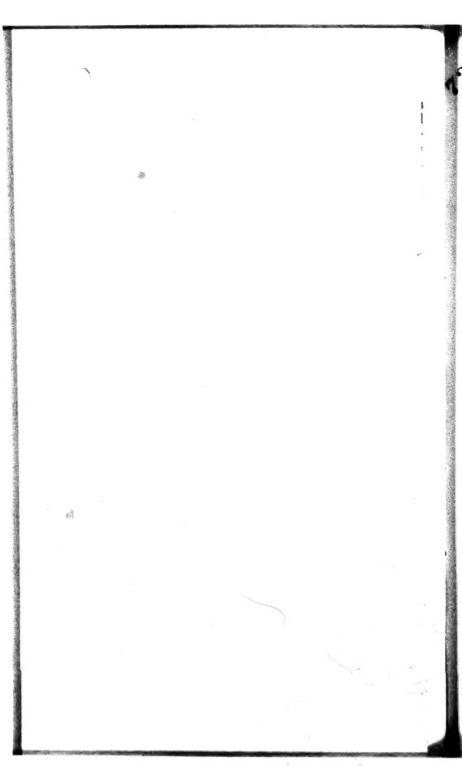
THE WITNESS: He said a union representative. They were members, members of the union filed the charges against —

TRIAL EXAMINER: In every case the charge was

filed by a member of the union?

THE WITNESS: Right.





1

FILE

in the

SEP 27 19

Supreme Court of the United

STORENDE BAK, JR

OCTOBER TERM, 1973

No. 73 556

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

vs.

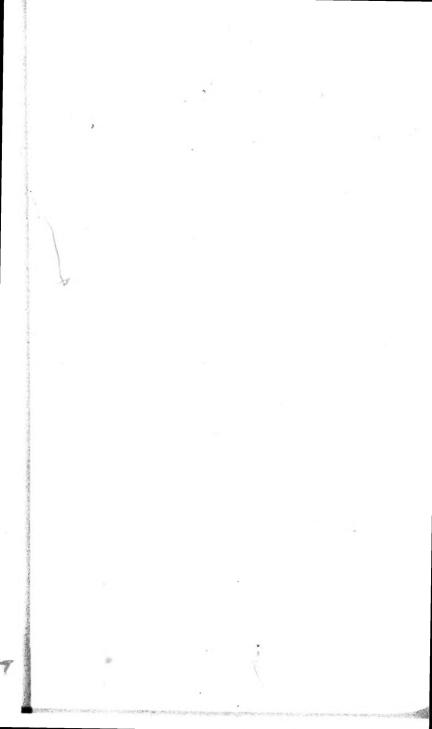
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 AND 1263, Respondents,

and

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAY C. MULLER
Muller & Mintz
100 Biscayne Boulevard, N.
Miami, Florida 33132
Attorney for Petitioner



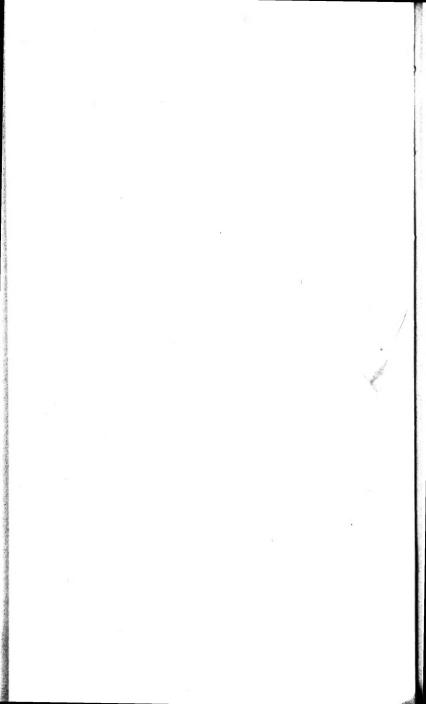
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# in the

# Supreme Court of the United States OCTOBER TERM, 1973

No.		
110.	-	

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 AND 1263, Respondents,

and

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT Petitioner, Florida Power & Light Company, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 29, 1973.

### OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 3-75, is not yet officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board, printed in Appendix B hereto, *infra*, pp. 77-101, are reported 193 NLRB No. 7.

#### JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1973 (App. A, *infra*, pp. 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the National Labor Relations Board (hereafter, "Board") properly found that a union unlawfully restrains and coerces an employer in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances when it levies fines and imposes other sanctions against those representatives—Company supervisors—who were union members, who crossed union picket lines and performed Company work during a strike.

<sup>&</sup>lt;sup>1</sup>The Respondent Unions herein were Petitioners below, seeking to set aside a National Labor Relations Board order against them. Petitioner herein was Intervenor below, supporting the Board's cross-application for enforcement of its order, as Respondent below.

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), (hereafter, "Act") are set out in Appendix C, infra, pp. 103-104.

#### STATEMENT

# A. The Board's Finding of Fact.<sup>2</sup>

On October 22, 1969, eleven (11) Local Unions (R. 49)<sup>3</sup> representing Florida Power & Light Company's production and maintenance employees (R. 75-77) commenced an economic strike against the Company (R. 40). Picket lines were established and maintained at all, or substantially all, Company operational locations (R. 49). During the strike, which continued to December 29, 1969, supervisors who were members of the Respondent Unions, crossed the picket lines to perform work as required (R. 40; 48).

Following termination of the strike, five (5) of the Local Unions—Respondents here—notified the supervisors within their respective jurisdictions that charges had been filed against them for violations of the International Union's Constitution forbidding, generally, activity adverse to the Union's interests (R. 4; 50-53; 107). Fifty-four (54) (R. 14-17) supervisors were thereafter fined in amounts up to Six Thousand Dollars (\$6,000.00) and/or expelled

<sup>&</sup>lt;sup>2</sup>This matter was considered by the Board on a stipulation by the parties as to facts and issues, the parties waiving a hearing before a Trial Examiner.

<sup>3&</sup>quot;R" refers to the record below, containing the Board's decision and order, the stipulation of the facts and issues by the parties below, and documentary exhibits.

from Union membership. Further, by the expulsions, those expelled lost their membership in a Union sponsored death benefit fund and their eligibility for Union pension benefits (App. B, p. 81, R. 56).

### B. The Board's Decision and Order.

On the stipulated facts and issues, the Board concluded (Member Fanning dissenting) that Respondent Unions had restrained and coerced the Company in the selection of its representatives for collective bargaining and adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act, by imposing fines and other sanctions on those supervisors who had crossed the picket lines and performed work, including bargaining unit work, for the Company during the strike.

The Board reasoned that "the fines struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances"—its supervisors—"and therefore restrained and coerced employers in their selection of such representatives." The fact that the Company acquiesced in the retention of Union membership by the supervisors does not change the unlawful effect of the discipline. Nor does the fact that certain of the disciplined supervisors did not supervise bargaining unit employees alter the conclusion. According to the Board, the degree of coercion or restraint is no less because the disciplined supervisor has no "official role to play in the relations between the Union and the Employer." (R. 6).

The Board order (App. B, p. 86) required Respondent Unions to cease and desist from the conduct found unlawful and from in any like or related manner restrain-

ing or coercing the Company or any other employer in the selection of its collective bargaining or grievance adjustment representatives. Affirmatively, the Respondent Unions were ordered to rescind and expunge all records of, and refund the fines; to restore membership where cancelled and to take appropriate action to restore eligibility for all pre-discipline benefits.

# C. The Decision of the Court of Appeals.

The instant case, Florida Power & Light Company, was consolidated with International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board (Illinois Bell Telephone Co.) and reheard en banc "to resolve an important question of first impression arising under the National Labor Relations Act" (App. A, infra, p. 4).

That case (hereafter, *Illinois Bell*) was initially before the Court of Appeals for the District of Columbia on a petition by the Board to enforce its order against the Union on an unfair labor practice finding. The court, Judge Wright dissenting, enforced the Board's order, finding that discipline imposed on supervisors for crossing picket lines did restrain and coerce the Company in the selection of its representatives and detracted from the undivided loyalty owed by supervisors to the employer. The opinion of the three-judge panel (Judge Wright dissenting) is not published, but is included as Appendix F, *infra*, pp. 127-183.

Upon consolidation of *Illinois Bell* and the instant case, Florida Power & Light Company, and rehearing en banc,

the Court of Appeals denied enforcement of the Board's orders in both cases.4

The opinion of the court rejected the Board's conclusions in both cases and held that no violation exists unless the sanctions imposed upon supervisors were imposed as a result of the supervisor's activity as a Company representative for the purpose of collective bargaining or the adjustment of grievances.

The two-judge concurring opinion advances, primarily, the thesis that Congress gave the employer the option of refusing to hire union members as supervisors and never intended to allow supervisors to obtain advantages of union membership without assuming the obligations normally incident to such membership.

The four-judge dissent rejects the majority view that when a supervisor performs bargaining unit work during a strike, he is doing something unrelated to his supervisory function. Rather, they reason that a supervisor who performs bargaining unti work is furthering the employer's interest by enhancing its bargaining position during a strike.

Further, the dissent contends that the majority ignores the Board's argument that if a union can impose fines on supervisors who are acting in the employer's interest by performing struck work, such fines would drive a wedge between the supervisors and the employer, thus interfering with the loyalty and performance of the duties the employer

<sup>&</sup>lt;sup>4</sup>The decision was by a divided court; three judges joined in the opinion of the court; two judges concurred with a separate opinion; four judges dissented.

has a right to expect from them. The Board has drawn a proper inference supported by substantial evidence that the discipline imposed upon the supervisors will interfere with the performance of their supervisory duties and, according to the dissent, this finding should be respected. Concluding, the four-judge dissent argues that the majority finds the determinative factor to be the type of work a supervisor performs during a strike. In terms of Congressional purpose underlying those sections of the Labor Management Relations Act treating with supervisors, the dissent finds this distinction makes no sense.

## REASONS FOR GRANTING THE WRIT

1. The en banc decision of the court below in the instant case is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in National Labor Relations Board v. Local 2150, International Brotherhood of Electrical Workers, AFL-CIO, \_\_\_\_\_ F.2d \_\_\_\_\_, (C.A. 7, 1973) #71-1864, decided August 13, 1973 (hereafter, Wisconsin Electric) (App. D, infra, pp. 105-117). Further, Wisconsin Electric is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in National Labor Relations Board v. San Francisco Typographical Union No. 21, International Typographical Union, AFL-CIO, \_\_\_\_\_ F.2d \_\_\_\_\_, (C.A. 9, 1973), Nos. 71-2949 and 71-2987, decided May 18, 1973 (hereafter, Typographical Union) (App. E, infra, pp. 119-122).

<sup>&</sup>lt;sup>5</sup>In footnote 7 (App. D, infra, p. 110) the court specifically rejected the majority holding in the en banc Florida Power opinion: "At the very least, insofar as it reaches an opposite conclusion on these facts, we disagree with the majority opinion therein and we are in accord with Judge MacKinnon's dissenting opinion . . ."

In Wisconsin Electric, the majority (Judge Kiley dissenting) accepted the Board's rationale that fines imposed on supervisors for crossing picket lines and performing bargaining unit work during a strike would, if let stand, "drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform" (App. D, infra, p. 108). The majority went on to reason that Section 8(b) (1) (B) of the Act could not properly be limited to union discipline of an employer representative based only on the representative's actions regarding the negotiation of a contract or the adjustment of a grievance, and stated:

"Because they are supervisors, an employer has a right to expect that whether they are union members or not, they will discharge their properly supervisory or managerial responsibilities in the best interest of the company.

What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike."

Judge Kiley dissented "for the reasons . . . expressed by Judge Skelly Wright in International Brotherhood of Electrical Workers, etc. et al. v. National Labor Relations Board, Nos. 71-1559 (Illinois Bell) and 71-1712 (Florida Power)."

The question presented in Typographical Union was substantially identical to that presented in Florida Power (consolidated with Illinois Bell), and in Wisconsin Electric. Thus, during an economic strike, certain union member supervisors performed Company work during a strike. Upon charges by the Union, they were fined for their activity. The Court of Appeals for the Ninth Circuit declined to enforce the Board's order, concluding that as union members, the supervisors were subject to union discipline. Citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), the court reasoned that to find a violation of Section 8(b) (1) (B) in the circumstances of the case would improperly weaken the union in use of its "ultimate weapon," an economic strike (App. E, infra, p. 121).

We submit that the courts of appeals are in substantial disagreement as to the proper scope and application of the restriction contained in Section 8(b)(1)(B) of the Act. Further, as to the Court of Appeals for the District of Columbia and the Court of Appeals for the Seventh Circuit, there are irreconcilable differences between members of the respective courts as to the proper interpretation of that Section. We feel there is a strong probability that the Board, in its experience and expertise, has advanced the proper scope of Section 8(b)(1)(B) of the Act. Were it otherwise, a union when exercising its "ultimate weapon," could subvert the loyalty a Company is entitled to expect from its supervisors and with impunity engage in "interference with the employer's right to control its own representatives." [NLRB v. Toledo Locals Nos. 15-P and 272, Lithographers & Photoengravers Int. Union, 437 F.2d 55 at 57 (C.A. 6, 1971).]

The Board, in its developing experience and expertise, has concluded that Section 8(b) (1) (B) of the Act forbids a union from imposing sanctions against a union member supervisor for acting in the legitimate business interests of his employer during a strike. This conclusion, and the conclusion in the instant case, has developed from, and is supported by, a uniform series of Board decisions. San Francisco-Oakland Mailers Union No. 18, 172 NLRB No. 252 (1968); Dallas Mailers Union, Local 143, 181 NLRB 286 (1970), enf'd. 445 F.2d 730 (C.A.D.C., 1970); New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.), 176 NLRB 797 (1969) and 177 NLRB 500 (1969), enf'd. sub nom., NLRB v. New Mexico District Council of Carpenters and Joiners, 454 F.2d 1116 (C.A. 10, 1972); Toledo Locals Nos. 15-P and 272, Lithographers & Photoengravers International Union, AFL-CIO (Toledo Blade), 175 NLRB 1072 (1971), enf'd. 437 F.2d 55 (C.A. 6, 1971); Sheet Metal Workers International Association, Local Union 49, AFL-CIO, 178 NLRB No. 24 (1969), enf'd. 430 F.2d 1348 (C.A. 10, 1970); Houston Typographical Union No. 87, 182 NLRB 592 (1970); Meat Cutters Local 81, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, 185 NLRB 884 (1970), enf'd. 458 F.2d 794 (C.A.D.C., 1972).

We submit that unless the conflict now existing between the Circuit Courts of Appeals, and between the Board and District of Columbia Circuit and Ninth Circuit, is resolved by this Court, this very important area of labor law will become a morass of uncertainty and continuing conflict as to legal rights throughout the country. Review is therefore warranted.

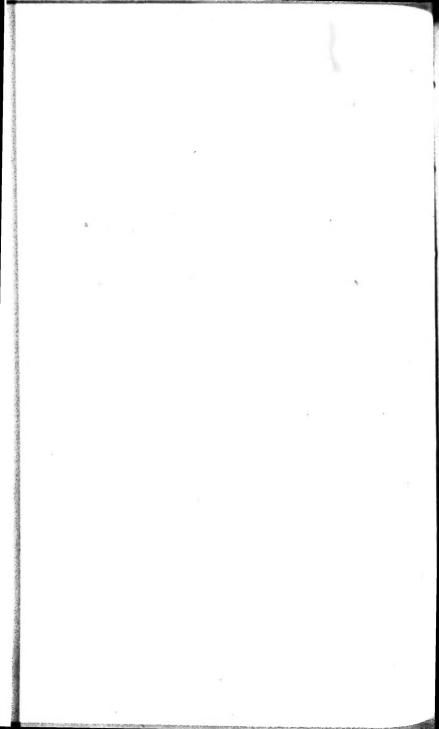
## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

RAY C. MULLER

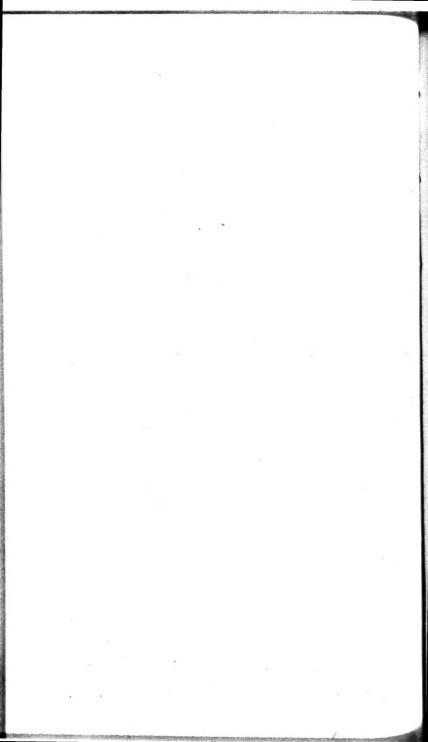
Attorney for Petitioner

August, 1973.



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#### APPENDIX A

App. 1

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT September Term, 1972

No. 71-1559

International Brotherhood of Electrical Workers AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO,

Petitioners

v.

National Labor Relations Board No. 71-1712 International Brotherhood of Electrical Workers, Locals 641, 622, 759, 820, and 1263,

Petitioners

v.

National Labor Relations Board,

Respondent
Florida Power and Light Company,

Intervenor

PETITIONS TO REVIEW
AND CROSS-APPLICATIONS FOR ENFORCEMENT
OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD

Before: Bazelon, Chief Judge, and Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges, sitting en banc

[Filed June 29, 1973]

#### JUDGMENT

These causes came on to be heard by the Court en banc and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court en banc, that the orders of the National Labor Relations Board on review herein are reversed and these cases remanded for the reasons set forth in the opinions filed this date.

Per Curiam

Date: June 29, 1973

Opinion of the Court, concurred in by Chief Judge Bazelon and Circuit Judges McGowan, Leventhal and Robinson filed by Circuit Judge Wright.

Concurring opinion in which Circuit Judge McGowan joins, filed by Circuit Judge Leventhal.

Dissenting opinion concurred in by Circuit Judges Tamm, Robb, and Wilkey filed by Circuit Judge MacKinnon. Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

#### No. 71-1559

International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO, petitioners

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

#### No. 71-1712

International Brotherhood of Electrical Workers, Locals 641, 622, 759, 820, and 1263, petitioners

NATIONAL LABOR RELATIONS BOARD, RESPONDENT FLORIDA POWER & LIGHT COMPANY, INTERVENOR

Petitions to Review and Cross-Applications to Enforce Orders of the National Labor Relations Board

On Rehearing En Banc

Decided June 29, 1973

Laurence J. Cohen for petitioners in No. 71-1559.

Scymour A. Gopman for petitioners in No. 71-1712.

Daniel M. Katz, Attorney, National Labor Relations Board, with whom Marcel Mallet-Prevost, Assistant General Counsel, and Warren M. Davison, Deputy Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Ray C. Muller for intervenor in No. 71-1712.

Before Bazelon, Chief Judge, and WRIGHT, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges, sitting en banc.

Opinion for the court, concurred in by Chief Judge BAZE-LON and Circuit Judges McGowan, Leventhal and Robinson, filed by Circuit Judge Wright, at p. 2.

Concurring opinion, in which Circuit Judge McGowan joins, filed by Circuit Judge LEVENTHAL, at p. 50.

Dissenting opinion, concurred in by Circuit Judges TAMM, ROBB and WILKEY, filed by Circuit Judge MACKINNON, at p. 55.

WRIGHT, Circuit Judge: These cases were consolidated and heard en banc to resolve an important question of first impression arising under the National Labor Relations Act: Does a union commit an unfair labor practice under Section S(b)(1)(B), 29 U.S.C. § 15S(b)(1)(B) (1970), by disciplining supervisor-members for crossing a picket line and performing rank-and-file struck work during a lawful economic strike against the company? The National Labor Relations Board answered the question in the affirmative and issued cease and desist and other orders against the unions involved. We reverse, deny en-

<sup>&</sup>lt;sup>1</sup> Sec Int. Brhd of Electrical Wkrs System Council U-4, 193 NLRB No. 7 (1971); Int. Brhd of Electrical Wkrs, 192 NLRB No. 17 (1971).

forcement of the Board's orders, and remand both cases to the Board with instructions to dismiss the complaints.

Although the issue, as stated above, is a legal question of statutory construction, we think it helpful to have a full understanding of the factual context in which the issue arose in the two cases before us.

# Florida Power & Light Co., No. 71-1712

The Florida Power & Light Company has, since 1953, maintained a collective bargaining agreement with the International Brotherhood of Electrical Workers, AFL-CIO, through the union's System Council U-4 comprising the local unions involved in this case. There was no provision in the collective bargaining agreement requiring employees to become members of the union as a condition of employment, and union membership was accordingly voluntary. Section 14(a) of the Act, 29 U.S.C. § 164(a) (1970), provides that an employer shall not be compelled to deem supervisors as employees for the purpose of collective bargaining. In addition, Section 2(3) exempts supervisors, as

<sup>&</sup>lt;sup>2</sup> System Council U-4 in fact comprises 12 local unions, only 5 of which are involved in the present controversy. The Board entered its order only against the locals involved, not against the Council.

<sup>&</sup>quot;Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

<sup>\*29</sup> U.S.C. § 152(3) (1970):

<sup>&</sup>quot;The term 'employee' \* \* \* shall not include any individual employed as \* \* \* a supervisor \* \* \* "

defined in Section 2(11), from the definition of "employee" in the Act, thereby depriving supervisors of the protections of the Act and permitting an employer to refuse to hire union members as supervisors and to refuse to engage in collective bargaining with its supervisors. Florida Power chose not to exercise its rights under these sections and recognized the union as the exclusive bargaining representative for many of its supervisory employees. They were considered part of the bargaining unit and their wages and conditions of employment were set out in the bargaining agreement.

Other higher ranking supervisors were not represented by the union for collective bargaining purposes and did not have their wages and conditions of employment determined by the collective bargaining agreement. These included supervisors in the positions of District Supervisor,

<sup>\* 29</sup> U.S.C. § 152(11):

<sup>&</sup>quot;The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

<sup>\*</sup>See Carpenters District Council of Milwankee County v. NLRB, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959); A. H. Bull Steamship Co. v. National Marine Engineers' Beneficial Assn, 2 Cir., 250 F.2d 332, 339 (1957); NLRB v. Edward G. Budd Mfg Co., 6 Cir., 169 F.2d 571, 579 (1948), cert. denied, 335 U.S. 908 (1949).

<sup>&</sup>lt;sup>1</sup> See L. A. Young Spring & Wire Corp. v. NLRB, 82 U.S. App.D.C. 327, 163 F.2d 905 (1947), cert. denied, 333 U.S. 837 (1948).

Assistant District Supervisor, Assistant Supervisor, Plant Superintendent, Plant Supervisor, Assistant Plant Superintendent, Distribution Assistant, Results Assistant, Assistant Plant Engineer, Substation Supervisor, and some miscellaneous supervisory classifications. The company, however, also permitted these higher ranking supervisors, many of whom had attained high ranking supervisory status after passing through the rank and file and through lower bargaining unit supervisory classifications, to maintain their union membership. It is with these high ranking supervisors who, though union members, were not represented by the union for collective bargaining purposes that the present case is concerned.

Although their wages and conditions of employment were not negotiated for them by the union, these supervisors nevertheless received substantial benefits from union membership. In particular, union membership in good standing gave them the right to participate in the System Council Death Benefit Fund and made them eligible for

The union also disciplined bargaining unit supervisors for crossing the picket line and performing rank-and-file struck work. The Board, however, did not attempt to base its unfair labor practice finding on union discipline of these members, expressly excluding this aspect of the case by stipulation. See Joint Appendix at 57. We might note, however, that under the Board's approach §8(b)(1)(B) would bar union discipline of supervisor-members whose wages and conditions of employment are covered by the collective bargaining agreement. See generally pp. 45-46 infra.

<sup>•</sup> Under the terms of the Fund's by-laws, upon the death of any member the deceased's beneficiary would receive benefits equal to one dollar times the number of members of the Fund in good standing during the month prior to the member's death. Money with which to pay the benefits was obtained by assessing each member one dollar upon the death of any other member.

pension, disability, and death benefits under the terms of the International's constitution.<sup>10</sup>

A small number of the supervisors involved in this case were union members who paid no dues because they had obtained withdrawal cards from the union. Some had apparently obtained "honorary" withdrawal cards, under the terms of which the member did not actively participate in the union and did not pay monthly dues. The card constitutes a valuable benefit, however, as it permits the holder, in the event he loses his supervisory position and returns to the rank and file, to return to active membership without paying the initiation fee normally required of new members, simply by returning the withdrawal card and resuming payment of dues. It was the practice of the System Council Death Benefit Fund to permit supervisors who had obtained honorary withdrawal cards to continue their participation in the Fund. Other supervisors had apparently obtained "participating" withdrawal cards. Under the International constitution, these members could not actively participate in the union, but continued to pay a monthly fee equal to normal monthly dues, and therefore continued to remain eligible for pension, death, and disability benefits.11

All union members, including those on withdrawal cards, 12 bore certain obligations under the union's constitu-

These benefits were funded from the monthly dues required of every member.

<sup>&</sup>quot; See note 10 supra.

<sup>12</sup> Art. XXVI, § 5 of the International Constitution provides:

<sup>&</sup>quot;The validity of any withdrawal card shall be dependent upon the good conduct of the member. \* \*

<sup>&</sup>quot;A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with provisions of this Constitution."

tion, which provides that "[a]ny member may be penalized for committing any one or more" of 23 listed offenses. The offenses most relevant to the present case are "(10). Working in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W." and "(21) Working for any individual or company declared in difficulty with a [local union] or the I.B.E.W., in accordance with this Constitution." In the collective bargaining agreement, however, the union made certain concessions with respect to union discipline of supervisor-members. The contract provides:

"• • It is further agreed that employees in [supervisory] classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification.

From October 22, 1969 through December 28, 1969, the union was engaged in an economic strike against the company, and the local unions maintained picket lines at nearly all of the company's operational facilities. Many supervisor-members crossed the picket lines and performed rank-and-file struck work—that is, work normally performed by nonsupervisory employees when no strike is in progress.<sup>13</sup> Whether they crossed the picket line at the request of the company or totally of their own volition is not revealed in the record. The union brought charges for

is It is conceded that the union did not fine those supervisors, if any, who crossed the picket line solely to perform their usual supervisory functions.

violations of the union's constitution, and those found guilty of crossing the picket line to perform rank-and-file struck work received fines of from \$100 to \$6,000. Most were also expelled from the union, thereby losing their right to continue participating in the System Council Death Benefit Fund. By expulsion they were also deprived of the membership in good standing which was a prerequisite for receiving pension, disability, or death benefits under the International constitution.<sup>14</sup>

The Board found that in so disciplining supervisor-members the union violated Section S(b)(1)(B) because the fines "struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of such representatives." Int. Brhd of Electrical Whrs System Council U-4, 193 NLRB No. 7 (slip opinion at 6) (1971). Accordingly, the Board ordered the union to cease and desist, rescind all fines, expunge all records of disciplinary proceedings, restore union membership, restore eligibility in all benefit plans, and post appropriate notices.

## Illinois Bell Telephone Co., No. 71-1559

The Illinois Bell Telephone Company and its predecessors have, since 1909, maintained a contractual relationship with Local 134, International Brotherhood of Electrical Workers, AFL-CIO. Illinois Bell, like Florida Power, chose not to exercise its right under Sections 2(3), 2(11), and 14(a) of the Act to refuse to hire union members as

<sup>&</sup>lt;sup>14</sup> We intimate no views concerning the reasonableness of the fines or expulsions. Such matters are not within the Board's jurisdiction under § 8(b) (1) but rather may be litigated in appropriate state court proceedings. See generally NLRB v. Bocing Co., —— U.S. ——, 41 U.S. L. WEEK 4678 (May 21, 1973).

supervisors. The union was recognized as the exclusive bargaining representative, not only for rank-and-file journeymen and apprentice employees, but also for employees within certain supervisory categories, including General Foreman, P.B.X. Installation Foreman, and Building Cable Foreman. These supervisors, as well as rank-and-file members of the bargaining unit, were required to become and remain members of Local 134 under the terms of a union security clause agreed to by the company in the collective bargaining agreement.

As recently as 1959, the collective bargaining agreements had prescribed monthly wage rates applicable to these foremen. Contracts since then have not contained such wage provisions, but the bargaining agreement in effect at the time of the instant dispute included a section entitled "Working Conditions for General Foremen and Foremen," which concerned payment for overtime work and for certain absences. Other provisions of the agreement, for example that dealing with vacations, were found by the trial examiner to be applicable to foremen as well as to rank-and-file employees.<sup>15</sup>

Other higher ranking supervisors were not part of the bargaining unit and were not represented by the union for collective bargaining purposes. None of their conditions of employment were determined by the bargaining agreement. These included employees in the positions of District Installation Superintendent, Plant Assignment Foreman, and Test Center Foreman. The company also permitted these higher ranking supervisors to maintain their union membership. In fact, in 1954, when the position of District Installation Superintendent was first created, the

No. 17 (trial examiner's decision at 3).

company and the union signed a Letter of Understanding, apparently still in force, providing that

"[a]s District Installation Superintendents • • • their wages and conditions of employment will not be a matter of union-management negotiations but They [sic] will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and insurance benefits as a result of their membership in the union. • • • "

In contrast to Florida Power, we are here concerned with supervisors both in and out of the bargaining unit.

All supervisor-members received substantial benefits from union membership. Those in the bargaining unit benefitted in having the union act as their representative for collective bargaining purposes, including the benefit of any contract provisions obtained on their behalf by the union. Those both in and out of the bargaining unit benefitted from participation in the International's pension benefit and death benefit plans and from participation in group life insurance and old age benefit plans sponsored by Local 134. As in Florida Power, some supervisor-members apparently were no longer active dues-paying members but had obtained withdrawal cards. But, as indicated earlier, those on withdrawal cards continued to benefit under certain of the benefit plans.

The same International union is involved in both cases, and union members of Illinois Bell bore the same obligations under the International's constitution as were described earlier. In contrast to the Florida Power case, however, there was no provision in the Illinois Bell collective bargaining agreement in which the union purported to make any concessions with respect to union discipline of supervisor-members. The only related provision is in the 1954 Letter of Understanding which, after recognizing

that those serving as District Installation Superintendents will be permitted to continue union membership, provides:

"However, any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personnel."

Between May S, 1968 and September 20, 1968, Local 134 engaged in an economic strike against the company. At the inception of the strike, the company informed supervisory personnel that it would like to have them come to work during the work stoppage, but it told them the decision whether to work or to respect the strike was a matter left to the personal discretion of each individual. Indeed, the employer indicated that those who chose not to work would not be penalized: In contrast, Local 134 warned its supervisor-members, at a union meeting held immediately before the strike, that they would be subject to union discipline if they performed rank-and-file work during the strike. During the course of the strike, some of the supervisor-members crossed the union's picket line to perform rank-and-file struck work, while other supervisors honored the strike and stayed away from work. Local 134 carried out its pre-strike warning and brought disciplinary actions against a number of supervisors. Those who were found guilty of performing rank-and-file work during the strike were each fined \$500. Unlike Florida Power, apparently no supervisors were expelled from the union or denied the right to continue participating in various union benefit plans. Local 134 has commenced suit in the Illinois courts to collect some of the fines, but insofar as any supervisors have paid any part of the fines the company has reimbursed them.

The Board found that in so disciplining supervisormembers the union violated Section S(b)(1)(B) because "the underlying dispute giving rise to the fines was between the Union and Illinois Bell rather than between the Union and its supervisor-members." Int. Brhd of Electrical Wkrs, 192 NLRB No. 17 (slip opinion at 7) (1971). The Board referred to its decision in a case consolidated with Illinois Bell for purposes of oral argument before the Board in which it had said:

" \* \* The intent [of Section S(b)(1)(B)] is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position casts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective bargaining and grievance adjustment representative. The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collectivebargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. . . . "

Local Union No. 2150, Int. Brhd of Electrical Whrs, 192 NLRB No. 16 (slip opinion at 7) (1971). Accordingly, the Board ordered the union to cease and desist, rescind all fines, expunge all records of disciplinary proceedings, and post appropriate notices.

I

Section S(b)(1)(B) provides: "It shall be an unfair labor practice for a labor organization or its agents • • • to restrain or coerce • • • an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances • • •." (Emphasis

added.) The purpose of this provision is clear on its face. It is designed to prevent unions from restricting management's free choice of its agent to bargain with the union or adjust grievances. Under the Act, each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent. See NLRB v. Int. Ladies' Garment Wkrs Union, 3 Cir., 274 F.2d 376 (1960).

The legislative history of the section is fully consistent with this literal reading. The Senate Report says that the section

"proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances.

• • • [T]his subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."

1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELA-TIONS ACT (hereinafter "Legis. Hist.") 427 (1948). Senator Taft gave an appropriate example of the kind of activity the section was designed to proscribe:

"This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' ""

2 Legis. Hist. 1012. Senator Ellender echoed the same concerns:

« • • [Q]uite a few unions forced employers to change foremen. They have been taking it upon them-

selves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences."

Another concern expressed in the legislative history involves unions forcing management to bargain through a multi-employer association.

"" • • [A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members • • • "

#### 1 Legis. Hist. 427.

"• • • Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' • • •"

# 2 Legis. Hist. 1012 (remarks of Senator Taft).

For over 20 years since its enactment in 1947, Section S(b)(1)(B) interpretations by the Board faithfully followed its literal language and this legislative history. The cases decided by the Board involved attempts either to force employers into or out of multi-employer associations, see, e.g., United Slate, Tile, etc. Whrs Assn, Local 36 (Roofing Contractors Assn of Southern California), 172 NLRB No. 249 (1968); Orange Belt District Council of Painters No. 48 (Painting & Decorating Contractors of America, Inc.), 152 NLRB 1136 (1965), or to force dismissal of an employer bargaining representative or grievance adjuster considered objectionable because of his tough, anti-union attitude, see, e.g., Local 986, Teamsters Union (Tak-Trak, Inc.), 145 NLRB 1511 (1964); Los An-

geles Cloak Joint Board, ILGWU (Helen Rose Co.), 127 NLRB 1543 (1960). See also NLRB v. Local 294, Int. Brhd of Teamsters, 2 Cir., 284 F.2d 893 (1960).

That the present cases lie outside this original understanding of Section 8(b)(1)(B) seems obvious. There was no claim or showing in either case that the purpose of disciplining the supervisors was to get management to replace them. There is no indication that replacement of the fined supervisors was even a likely result of the union discipline. Indeed, just the opposite seems the case. In Illinois Bell, at the inception of the strike management expressly told all supervisors that no reprisals would be taken against those observing the picket line, and after the strike management promoted many of those who chose not to cross the picket line to perform rank-and-file work. Nor is there any indication in Florida Power that the company replaced any striking supervisors. The only purpose and likely effect of the imposition of union discipline was to force the supervisors to observe the picket line to the extent of not performing struck work for the employer. If anyone was restrained or coerced, it was the supervisors, not their employer.

Since 1968, however, the Board has embarked upon a new approach in applying Section 8(b)(1)(B), expanding its scope far beyond the situations encompassed in this original understanding. The process began with the Board's decision in San Francisco-Oakland Mailers' Union No. 18, 172 NLRB No. 252 (1968). In Oakland Mailers, management charged the union with attempting to discipline a foreman for the manner in which he interpreted the collective bargaining contract in making work assignments for the employees under his supervision. Although there was no allegation that the union was attempting to coerce the employer into hiring a new representative for collective bargaining and adjustment of grievances, the Board

nonetheless found a Section 8(b)(1)(B) violation. The union's actions, according to the Board, "were designed to change the [company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will." Slip opinion at 2. This was the sort of pressure which Section 8(b)(1)(B) was designed to prevent. "That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [company] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [company's] control over its representatives. Realistically, the [company] would have to replace its foremen or face de facto nonrepresentation by them." Id. at 3.

Although the Oakland Mailers doctrine unquestionably expanded Section 8(b)(1)(B) to cover situations not envisioned by the section's enactors, we have recognized and continue to recognize that its basic rationale is consistent with the purposes of Section 8(b)(1)(B). See Dallas Mailers Union, Local No. 143 v. NLRB, 144 U.S.App.D.C. 254, 445 F.2d 730 (1971). Where a supervisor is disciplined for the manner in which he performed his collective bargaining and grievance adjustment functions, the union's purpose in imposing such discipline and the discipline's likely effect is to change the manner in which the supervisor performs those functions in the future. Discipline therefore achieves by indirect means what Section 8(b)(1)(B) clearly was intended to prevent. It permits the union to get a supervisor who is not "too strict with the membership of the union," see page 14 supra, not by changing the identity of the supervisor, but by changing the attitude the supervisor brings to his grievance adjustment and collective bargaining tasks. Although Section S(b)(1)(B) speaks literally in terms of coercing the "selection" of employer representatives, it is clear that management's right to a

free selection would be hollow indeed if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance adjustment duties.

In several cases decided after Oakland Mailers, the Board continued to apply Section 8(b)(1)(B) to union attempts to discipline supervisors for the manner in which they performed their collective bargaining or grievance adjustment functions. In some of these cases fines had been imposed "for the manner in which the [foreman] had interpreted and administered" the collective bargaining agreement, Toledo Locals Nos. 15-P & 272. Lithographers & Photoengravers Int. Union (Toledo Blade Co.), 175 NLRB 1072 (1969), enforced, 6 Cir., 437 F.2d 55 (1971), or where the union had "sought, by an internal union procedure, to enforce its viewpoint as to the meaning of the contract," Sheet Metal Wkrs Int. Assn, Local Union 49 (General Metal Products, Inc.), 178 NLRB 139, 142 (1969), enforced, 10 Cir., 430 F.2d 1348 (1970). See also Houston Typographical Union No. 87, 182 NLRB 592 (1970); 16 Freight, Constr., Gen. Drivers, Warehousemen & Helpers Union (Grinnell Co. of the Pacific), 183 NLRB No. 49 (1970); 1 New Mexico District Council of Carpenters & Joiners (A. S. Horner, Inc.), 176 NLRB 797 (1969), enforced, 10 Cir., 454 F.2d 1116 (1972).18 In another case a

<sup>&</sup>quot;[T]he instant case involves discipline of a supervisormember \* \* \* for violation of the contract \* \* \*." 182 NLRB at 595 (trial examiner's decision).

Here the underlying contract dispute between the union and the supervisor-member was whether certain work fell within the supervisor's job classification under the contract or within other employees' job classifications. 183 NLRB No. 49 (trial examiner's decision at 4 & 9).

In this case the union disciplined a supervisor-member who co-signed a letter urging employees to vote with man-

foreman was fined for being too strict with one of the employees under his supervision, and the record clearly indicated that the union desired to have the foreman replaced. See Dallas Mailers Union, Local No. 143 v. NLRB, supra, enforcing 181 NLRB 286 (1970).

A common theme emerges from these cases which at once defines the scope of the Oakland Mailers doctrine and relates that doctrine to the core concerns of Section S(b) (1)(B). In each, "[t]he relationship between the Union and its members • • • [was] used as a convenient and, it would seem, powerful tool • • • to compel the Employer's foremen to take pro-union positions in interpreting the collective bargaining agreement." San Francisco-Oakland Mailers' Union No. 18, supra, 172 NLRB No. 252 (slip-opinion at 4).19

agement in an upcoming election. Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpoint on union members. The union thus disciplined the supervisor for the effective performance of his collective bargaining function, bringing the case squarely within the Oakland Mailers rationale.

<sup>&</sup>quot;There have been several cases dealing with the question whether the imposition by a union of a fine on an employer representative authorized to adjust grievances violates Section 8(b) (1) (B). In all these cases the Board found a violation. However, \* \* \* they involved fines imposed on a supervisor because of his alleged violation of a collective bargaining contract, and the Board's rationale in those cases \* \* \* was that the respondent union's action was designed to compel the supervisor 'to take pro-union positions in interpreting the collective-bargaining agreement.' It is apparent from this that the Board was influenced in those cases by the fact that the supervisor was disciplined for an alleged misinterpretation or misapplication of the contract, and that the natural and foresceable effect of such discipline was that, in resolving future grievances over alleged contract

The cases before us, however, are critically different from those decided under Oakland Mailers and lie outside the rationale of that case and its progeny. In both cases here the union has disciplined supervisors, not for the way they interpreted the collective bargaining agreement, not for being too strict with union members, but simply for crossing a picket line to perform rank-and-file struck work. There is no underlying dispute relating to contract interpretation or grievance settlement in these cases, but rather an economic clash between union and employer totally unrelated to the manner in which supervisors perform their collective bargaining or grievance settlement functions. As the trial examiner in Illinois Bell pointed out, the previous cases are all

"readily distinguishable here where the action for which the supervisors were fined bore no direct rela-

violations, the supervisor would be reluctant to take a position adverse to that of the union \* \* \*. Local Union No. 453, Brhd of Painters, etc. (Syd Gough &

Sons, Inc.), 183 NLRB No. 24 (1970) (trial examiner's deci-

sion at 3) (footnotes omitted).

Only one previously decided § 8(b) (1) (B) opinion cannot be squared with this rationale, but it is explainable on other grounds. In New Mexico District Council of Carpenters & Joiners of America (A. S. Horner, Inc.), 177 NLRB 500. (1969), enforced, 10 Cir., 454 F.2d 1116 (1972), a union member was fined for working as a supervisor for a company which had no contract with the union. In these circumstances, however, compliance by the supervisor with the union's demands would have meant quitting his job with the employer, thereby having "the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances." 177 NLRB at 502. The case thus falls close to the original rationale of § 8(b) (1) (B) which was to permit the employer to keep the bargaining representative of his own choosing. See text at pp. 14-15, supra. See also Local Union No. 453, supra, 183 NLRB No. 24 (trial examiner's decision at 4).

tion to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section S(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section S(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself had made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in fining the supervisors who worked, or even in finding that the Union's action had any natural or inherent tendency to restrain or coerce the Company. \* \* \*"

192 NLRB No. 17 (trial examiner's decision at 9). And as Member Fanning pointed out in dissent:

"Here the supervisors were not fined because they gave directions to the work force, interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union. They were fined because they performed production work in the bargaining unit during a strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. • • •"

192 NLRB No. 17 (slip opinion at 13).

The Board insists, however, that the present cases fall within the Oakland Mailers rationale. Its position is couched in vague but superficially appealing language. It is said that these fines "impinged on the loyalty" which the employer should be able to expect from his supervisors, id. at 6, that if they were found to be lawful they would permit the union "to drive a wedge between a supervisor and the Employer," Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra, 192 NLRB No. 16 (slip opinion at 6), and that as a result an employer "could no longer count on the complete and undivided lovalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances." Id. at 6-7. If we try to rephrase the Board's language in terms consistent with the rationale of Oakland Mailers, the Board's position seems to come down to the following propositions. By being forced to take sides with the union during any confrontation between union and employer, even one unrelated to performance of his collective bargaining or grievance adjustment functions, a supervisor becomes, or is likely to become, more loyal to the union and less loyal to the company. He is then likely to bring this shift in loyalties to his grievance adjustment or collective bargaining tasks in the future, thus achieving in the end precisely that which Section 8(b)(1)(B) and the Oakland Mailers doctrine were intended to prevent. In our view, the Board overestimates the risk that discipline for performing rankand-file struck work will significantly affect performance of grievance adjustment and collective bargaining functions.

Discipline, or the threat thereof, may well force a supervisor to observe a picket line, but it is questionable whether it will turn him into a believer in the union's cause. The Illinois Bell Company apparently recognized as much when it promoted many of those supervisors who, under threat of union discipline, refused to cross the

picket line to perform rank-and-file struck work. Our everyday experience tells us that the result of discipline is normally some degree of hostility toward the person or group imposing the discipline, and this commonsense analysis appears confirmed by the record in the cases before us. The result of threatened union discipline was to turn the supervisors against the union, not to ingratiate them into the union fold. This is even clearer when we look at expulsion as a disciplinary measure. Those who are expelled are obviously going to be more loyal to the company and less loyal to the union in the future. One who has resigned or been expelled from union membership owes no further obligations to the union. See NLRB v. Granite State Joint Board, Textile Wkrs Union of America, Local 1029, 409 U.S. 213 (1972). Therefore, not only is there no reason to conclude that those supervisors of Florida Power who were expelled from the union will be more lenient with the union when they are called upon to interpret the contract, adjust grievances, or engage in collective bargaining in the future. Just the opposite is likely to be the case.

More importantly, let us concede for the moment that in some manner, perhaps through the camaraderie of the picket line, a supervisor who is forced under threat of discipline to observe a picket line undergoes a subtle change in attitude and comes to feel closer ties to the union. It still does not follow that this change in attitude will affect his performance of his collective bargaining or grievance adjustment functions. When a supervisor acts as such he is a representative of management, and as such he should be immune from union discipline. The unions participating in the present cases conceded as much as oral argument when they agreed that when a supervisor crosses a picket line to perform supervisory work he remains immune from discipline. But when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the

domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline. The dividing line between supervisory and nonsupervisory work in the present context is sharply defined and easily understood. There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties. Despite the Board's protestations to the contrary, he is not put in the difficult position of serving the union and the employer at the same time. As the Board has noted in an analogous situation where supervisory and rank-andfile functions were "sharply demarcated," the supervisors "will not be 'serving two masters at the same time.' They will be serving them at different times." See Great Western Sugar Co., 137 NLRB 551, 553-554 (1962).

The foregoing analysis should serve to dispel any support the Board might have hoped to obtain from our recent decision in Meat Cutters Union Local 81 v. NLRB, 147 U.S.App.D.C. 375, 458 F.2d 794 (1972). In its decision in this case, Meat Cutters Union Local S1, 185 NLRB No. 130 (1970), the Board found a Section 8(b)(1)(B) violation when a union attempted to discipline a supervisory employee for obeying a company order to institute a new meat procurement policy which would have resulted in a loss of union jobs. Meat Cutters differed from Oakland Mailers in that no one claimed that the new procurement policy had anything to do with the supervisor's grievance settlement or collective bargaining functions. It was thus unclear how the Board could claim that any substitution of attitudes or shift in loyalties in violation of Section 8(b)(1)(B) as to these functions had occurred, particularly in view of its recent explicit rejection of a per se ban on all union discipline of supervisory employees. See Local Union 453 Brhd of Painters, etc. (Syd Gough & Sons, Inc.), 183 NLRB No. 24 (1970).

When Meat Cutters was appealed to this court, we were clearly concerned that the Board's Section S(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors. Our objections to such a prohibition are explained in greater detail in Part III of this opinion, but suffice it for now to state that such an approach inequitably gives supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its brief in Meat Cutters, however, the Board sought to meet these fears and dispel them. "[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield," the Board argued. "Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. . . In fact, the Board has recently dismissed a Section S(b)(1)(B) complaint on the ground that the infraction of union rules for which the employer representative was disciplined did not involve the exercise of supervisory or managerial authority." NLRB brief at 15 in Meat Cutters Union Local 81 v. NLRB, supra.

Partially on the basis of these representations we enforced the Board's decision, but with the explicit caveat that "[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the ad-

justment of employee grievances, because he has performed duties as a management representative. • • • The N.L.R.B. has made it clear that a union may legally discipline a supervisor-member for acts which are not performed by the individual in furtherance of his obligations as the employer's representative." Meat Cutters Union Local 81 v. NLRB, supra, 147 U.S.App.D.C. at 379-380 n.12, 458 F.2d at 798-799 n.12. (Emphasis in original.)

Perhaps it is unfair to suggest that the Board is dissembling in seeking to draw some support for its present position from Meat Cutters, but certainly it is clear that the Board is changing its interpretation of the law to suit the case. Meat Cutters was an expansion of the Oakland Mailers doctrine, but it nevertheless was and remains directly tied to the principles Oakland Mailers properly implied from Section S(b)(1)(B). The discipline of the supervisor in Meat Cutters was not totally unrelated to the performance of grievance settlement functions since by fining the supervisor the union was avoiding and undercutting a clause in the contract that provided that all matters pertaining to the proper application of the agreement shall be handled by certain grievance-arbitration procedures spelled out in the agreement. See 147 U.S.App.D.C. at 378 n.6, 458. F.2d at 797 n.6. More importantly, the underlying dispute was one of contract interpretation since the union's basic position was that the new meat procurement policy which the supervisor was fined for enforcing violated the collective bargaining agreement. Sec 147 U.S.App.D.C. at 378, 458 F.2d at 797. Discipline was used, in effect, as a tool to enforce the union's interpretation of the collective bargaining agreement. See page 18 supra. In the present cases, by contrast, no question of grievance settlement or contract interpretation is either directly or indirectly involved. The underlying dispute is not one of contract interpretation, but simply a lawful economic strike against the company to get a better contract.

The Board, in a final attempt to bring this case within the holding of Meat Cutters, argues that crossing the picket line to perform rank-and-file work is part of a supervisor's management function. The Board claims that management "considered its supervisors among those it could depend on" during a strike, and that the employer "had a right to expect the supervisor" to cross the picket line and perform rank-and-file struck work. Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra, 192 NLRB No. 16 (slip opinion at 6). But saving that rank-and-file labor is part of a management function is tantamount to saying that black is white. Whatever the parameters of Meat Cutters' "management function" test may be, the term "management function" has no meaning except in contrast to the concept of rank-and-file work. And the Board's reference to management's "right" to expect supervisors to perform rank-andfile work is nothing but a facade by which the Board hopes to avoid analysis by assuming the answer to the question before it.

Try as one might, then, there is simply no way to derive the Board's decision in these cases from the literal language of Section S(b)(1)(B), from the legislative history, or from the gloss that has been added to that section by Oakland Mailers and subsequent cases. The Board's decision in these cases, in the words of the learned trial examiner in Illinois Bell, "stretch[es] the statute beyond what I would otherwise consider the breaking point." Int. Brhd of Electrical Whrs, 192 NLRB No. 17 (trial examiner's decision at 11) (1971).

In the final analysis, the Board's position in these cases does not rest on the language of Section S(b)(1)(B), Oakland Mailers, or Meat Cutters, but rather on a policy which the Board for the first time now finds imbedded in Section S(b)(1)(B)—that supervisors who are permitted by their employer to join unions owe their undivided loyalty to their employer in any dispute between the union and the em-

ployer. That the Board has just discovered this policy some 20-odd years after enactment of Section 8(b)(1)(B) makes us naturally suspicious that any such policy exists, especially since it appears that union discipline of supervisors is a long-standing problem that labor and management have attempted to resolve in a collective bargaining context for many years.20 The Board apparently derives this interpretation of the statute in large part from Sections 2(3) and 14(a) of the Act which, as noted earlier, deprive supervisors of the protections of the Act and give employers the right to refuse to hire union members as supervisors. The Board's analysis starts off correctly enough when it states that in enacting these sections Congress recognized that an employer should be able to keep his supervisors out of unions in order to ensure their undivided loyalty. But the Board is mistaken in leaping to the conclusion that this same objective should be furthered by interpreting Section 8(b)(1)(B) to preclude all union discipline of supervisormembers when the employer has permitted his supervisors to maintain union membership. We draw precisely the opposite conclusion from the interrelationship between Sections 2(3) and 14(a), on the one hand, and Section S(b) (1)(B) on the other. When Congress recognized that are employer should be able to have supervisors who owe him their undivided loyalty, it gave the employer a specific means to achieve such loyalty-the right to refuse to hire union members as supervisors, or in other words, the right. to require employees to relinquish union membership upon promotion to a supervisory position. Congress never intended the inequitable result of permitting supervisors to have it both ways-joining unions with the consent of their employer and obtaining all the advantages of union membership without assuming the basic obligations normally incident to such membership.

<sup>20</sup> See text at pp. 34-40 infra.

The policy questions raised in an analysis of the statutes are relevant not only in this context, but also in order to apply the principles set down in a line of Supreme Court cases concerning union discipline of members. Since, in our view, those cases control the ones before us, we now turn to consider the Supreme Court precedents and return in Part III to a discussion of the interrelationship between Section S(h)(1)(B) and the exclusion of supervisors from the protections of the Act in Sections 2(3) and 14(a).

#### II

The Board's rough sailing through the complexities of Section S(b)(1)(B) might, perhaps, be more understandable if the seas were entirely uncharted. But in fact union discipline of members who cross picket lines to do struck work has been the subject of a series of important Supreme Court decisions. The Board has considered these decisions in its past applications of Section S(b)(1)(B), but inexplicably chose to ignore them in its decision in the present cases. The Supreme Court's decisions, unlike the Board's approach, set out a rational, workable interpretation of Section S(b)(1) which balances a union's right to enforce reasonable discipline against the rights of employers and union members to be free from union overreaching.

The first and most important of these decisions is NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967). In all relevant respects, Allis-Chalmers is indistinguishable from these cases. There, as here, the union sought to impose reasonable fines on union members who had crossed a picket line during a lawful strike. In Allis-Chalmers, however, none of the fined members were supervisors, so the relevant provision governing the union's conduct was subsection (A) of Section 8(b)(1) rather than subsection (B). However, when the Supreme Court found the union innocent of any unfair labor practice, it did so not because

of anything peculiar to subsection (A), but rather because of its interpretation of the words "restrain or coerce" which are common to subsections (A) and (B). See Christensen, Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy, 43 N.Y.U. L. Rev. 227, 268 (1968). Thus the Court stated: "It is highly unrealistic to regard § 8(b)(1), and particularly its words 'restrain or coerce,' as precisely and unambiguously covering the union conduct involved in this case." 383 U.S. at 179. (Emphasis added.) On the contrary, such a reading of Section S(b)(1) would "attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort 'to fashion a coherent labor policy' and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon." Id. at 183.

Of course, Allis-Chalmers did not mean that unions were free to impose discipline for any purpose at all. Section S(b)(1) must be read so as to conform with the other provisions of federal labor law. Sec, e.g., NLRB v. Int. Ladies Garment Wkrs Union, supra, 274 F.2d 376; Silard, Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield, 38 Geo. WASH. L. Rev. 187, 193-196 (1969). Thus if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b) (1)." Scofield v. NLRB, 394 U.S. 423, 429 (1969). See NLRB v. Industrial Union of Marine & Shipbuilding Wkrs, 391 U.S. 418 (1968). But if one thing is clear after Allis-Chalmers, it is that there is no "overriding policy of the labor laws" which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rank-and-file struck work. In fact, quite the

contrary is true.

NLRB v. Allis-Chalmers Manufacturing Co., supra, 388 U.S. at 181. (Footnotes omitted.)

The Board attempted in its Oakland Mailers decision to distinguish Allis-Chalmers from cases arising under Section 8(b)(1)(B).

"• • • The Supreme Court, in finding lawful the union action involved in Allis Chalmers, relied in part on the proviso to Section S(b)(1)(A), providing that the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership shall not be impaired. However, that proviso is limited to Section S(b)(1)(A) of the Act only and is not a part of Section S(b)(1)(B). • • •"

San Francisco-Oakland Mailers' Union No. 18, supra, 172 NLRB No. 252 (slip opinion at 3-4). It is quite clear, however, that the Board has misread the Allis-Chalmers decision. The Court expressly stated in its opinion that it was unnecessary to decide whether the proviso protected the union discipline there under scrutiny. See NLRB v. Allis-Chalmers Manufacturing Co., supra, 3SS U.S. at 192 n.29. And as Mr. Justice Black pointed out in dissent: "[T]he Court correctly assumes that the proviso to § S(h)(1)(A) cannot be read to authorize its holding." Id. at 200. Indeed, our own court just recently characterized the holding in Allis-Chalmers as follows:

". . Instead of relying on the express language of

the proviso, ••• the Supreme Court carefully analyzed the entire legislative history of Section 8(h)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion.' •• "

Booster Lodge No. 405, Int. Assn of Machinists, etc. v. NLRB, supra, 148 U.S.App.D.C. at 125, 459 F.2d at 1149.

That the proviso is appended to Section 8(b)(1)(A) rather than to both that section and Section S(b)(1)(B) is without significance in these cases. As we saw earlier, under the original congressional understanding Section 8(b)(1)(B) did not affect union discipline of supervisors, but only concerned direct attempts to restrain or coerce employers. So understood, it was unnecessary to repeat the proviso in Section S(h)(1)(B). Now that Oakland Mailers has expanded Section S(h)(1)(B) to encompass indirect coercion of employers through discipline of supervisors, the proviso gains significance for both subsections of Section 8(b) (1), for as the Supreme Court noted in Allis-Chalmers, the proviso was only part of "the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions . . " 388 U.S. at 195. (Emphasis added.)

Apparently having sensed that its proviso distinction will not withstand analysis, the Board now puts forth a new argument. Allis-Chalmers, according to the Board, dealt only with internal union rules affecting the relationship between a member and the labor organization to which he belongs. Here, however, the Board claims, the union discipline does not concern legitimate internal union affairs, but affects primarily the employer who is external to the union-member relationship.<sup>21</sup>

<sup>&</sup>lt;sup>21</sup> The Board argues that the union has only a peripheral interest in fining the supervisors because supervisors make up such a small percentage of the total work force. In each case,

The Board's internal-external distinction, however, simply cannot be squared with the holding in Allis-Chalmers. Of course, the discipline in Allis-Chalmers had, and was intended to have, an external effect on the employer. By deterring strikebreakers the rule assured union solidarity and thereby allowed the union to bring greater economic pressure on the company. The discipline has precisely the same "external" effect in the present cases. If the antistrikebreaking activity there can be characterized as "internal" it simply makes no sense to label the same sort of anti-strikebreaking rule in these cases as "external." The Board recognized as much in its Oakland Mailers decision: "[O]nly legitimate internal union affairs are protected under Allis-Cholmers. The Allis-Chalmers case involved a union's fining of its members for crossing picket lines. The primary relationship there affected was the one between the union and its members, and the union's particular objective-solidarity in strike action-was deemed by the Supreme Court a legitimate area for union concern in the circumstances involved." San Francisco-Oakland Mailers' Union No. 18, supra, 172 NLRB No. 252 (slip opinion at 4). (Footnote omitted.)

It is true that Allis-Chalmers concerns only so-called "internal" union discipline in the sense that the term "internal" refers to the manner in which the union enforces its

the Board argues, the union fined less than 60 supervisors, while approximately 12,000 other employees in *Illinois Bell* and approximately 5,000 other employees in *Florida Power* remained, in the Board's words, "available for strike action." It is obvious, however, that the union had a definite and substantial interest in preventing even a small number of supervisors from performing rank-and-file struck work, since in the highly automated public utility industries involved in these cases a small work force composed of strikebreakers and non-union management personnel can evidently provide sufficient manpower to continue vital services in a strike, thereby cutting into the strike's effectiveness.

rule, not to the identity of the parties affected by the rule. Union discipline is internal when it is enforced through fines or expulsion from the union. It becomes "external," and a violation of Section S(b)(1)(A) as well as other sections of the Act, when the union seeks to have the employer fire or take other measures against the recalcitrant union member.<sup>22</sup> The Supreme Court made this clear in its decision in Scofield v. NLRB, supra, its next major Section 8(b)(1) case after Allis-Chalmers. Describing its analysis in Allis-Chalmers, the Scofield Court stated:

tion of the National Labor Relations Board dating from Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority

394 U.S. at 428. (Footnote omitted.) Sce also NLRB v. Allis-Chalmers Manufacturing Co., supra, 388 U.S. at 185; Local 283, United Auto., Aircraft & Agric. Imp. Whrs (Wisconsin Motor Corp.), 145 NLRB 1097, 1104 (1964), affirmed, sub nom. Scofield v. NLRB, supra. The internal-external distinction thus has nothing to do with who is affected by the union discipline. As the Court recognized in Scofield, union dicipline normally affects all three participants in the union-management relation: employer, employee, and union. Scofield v. NLRB, supra, 394 U.S. at 431. But it does not follow from this that enforcement of

<sup>22&</sup>quot; [Sections 8(b) (1), 8(b) (2), 8(a) (1), 8(a) (2), and 8(a) (3)] \* \* \* form a web, of which § 8(b) (1) (A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." Scofield v. NLRB, 394 U.S. 423, 428-429 (1969).

the rule violates the Act "unless some impairment of a statutory labor policy can be shown." Id. at 432.

The Board's last attempt to distinguish Allis-Chalmers relates to the matter of statutory labor policy. Subsequent to Allis-Chalmers, the Court made it clear that even internal enforcement of union rules violates Section S(b) (1) (A) if such enforcement "invades or frustrates an overriding policy of the labor laws," Scofield v. NLRB, supra, 394 U.S. at 429, or if it contravenes "other considerations of public policy . . . " NLRB v. Industrial Union of Marine & Shipbuilding Wkrs, supra, 391 U.S. at 424. The Board argues, as we indicated at the close of Part I of this opinion, that the legislative history of Sections 2(3) and 14(a) of the Act indicates an overriding congressional policy in favor of supervisors who are completely subservient to their employer's will. As indicated earlier, we disagree with the Board's analysis of the interrelationship between Section 8(h)(1)(B) on the one hand and Sections 2(3) and 14(a) on the other, and it is to this issue that we now turn.

### III

Although it is only since 1968 that the Board has sought to use Section 8(b) (1) (B) as a solution to conflict of loyalties problems arising from union discipline of supervisor-members, these problems are not of recent vintage.<sup>23</sup> Prior to passage of the National Labor Relations Act in 1935, it was quite common for foremen in many industries to become unionized in the same bargaining unit as their subordinates. See Jones & Laughlin Steel Corp., 66 NLRB 386, 400 (1946). Conflict of loyalties problems were common, and employers were concerned "lest foremen should be subject to union discipline for differing with the local union in

<sup>&</sup>lt;sup>23</sup> See, e.g., Local Union No. 57 v. Boyd, 245 Ala. 227, 16 So.2d 705 (1944), where a union fined a supervisor-member for firing another union member for loafing on the job.

the interpretation of the terms of a contract." Id. at 401 n.27, quoting H. Millis (ed.), How Collective Bargaining Works 67 (1942). Such problems as arose were apparently worked out through collective bargaining. Unions recognized the legitimate concerns of employers in having contracts fairly administered by foremen, and means were provided for resolving disputes. "The unions [did] not, however, forego their right to discipline foremen for disobeying laws relating to internal union matters, or for deliberately disregarding union rules." Ibid.

The problem of supervisor-member conflict of loyalties first came before the Board under the 1935 Act in the form of the question whether foremen and other supervisors were "employees" under the statute, that is, whether management was required to engage in collective bargaining with foremen. The Board first held that foremen were "employees" and entitled to the protections of the Act, see Union Collieries Coal Co., 41 NLRB 961 (1942), but abruptly shifted course a year later in Maryland Drydock Co., 49 NLRB 733 (1943). The Board justified its shift on fears that conflicts of loyalties would arise if foremen belonged to the same union as the men under their supervision.

"The very nature of a foreman's duties make him an instrumentality of management in dealing with labor. The duty of supervision with which he is principally charged implies a delegation of authority with respect to the selection, promotion, and discharge of the workers in his section. \* \* \* To hold that the National Labor Relations Act contemplated the representation of supervisory employees by the same organizations which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests."

Id. at 740. (Footnote omitted.) The Board, however, soon shifted positions again, holding that foremen were entitled to mandatory collective bargaining under the Act if they

formed unions independent of those representing the rank and file. See Packard Motor Car Co., 61 NLRB 4 (1945), enforced, 6 Cir., 157 F.2d 80 (1946), affirmed, 330 U.S. 485 (1947). And the next year, in Jones & Laughlin Steel Corp., supra, the Board held that supervisors were entitled to the protections of the Act even if they were represented by the same union that represented the rank and file.

The Board's opinion in Jones & Laughlin Steel Corp. is helpful in understanding the significance of the 1947 amendments to Sections 2(3) and 14(a) of the Act. To begin with, the Board recognized the conflict of lovalties problems arising from having supervisors belong to the same union that represents the rank and file. The Board noted the "serious and gennine concern about the effect of this decision upon the relations of management with its foremen, and the effect of the unionization of the latter upon their loyalty to the employer's interests." 66 NLRB at 402. But the Board concluded that "satisfactory solutions" to these problems "can be worked out by men of good will on both sides in the give-and-take of collective bargaining." Id. at 401. "[T] he union and the employer, neither of which is lacking in ingenuity, should not be discouraged by this Board from working out, at the bargaining table, contract clauses which will deal with this difficult situation. Such clauses can guarantee the maintenance of discipline by supervisors without fear of reprisal by the rank-and-file . . " Id. at 402-403.

The question whether foremen and other supervisory employees were entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities assured to employees by the 1935 National Labor Relations Act came before the Supreme Court in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). The Court had before it the arguments "that unionization of foremen is from many points bad industrial policy, that it puts the union foreman in the position of serving two masters, divides his loyalty

and makes generally for bad relations between management and labor." Id. at 493. But the Court found policy to be irrelevant to its decision, and felt compelled to define the statutory term "employee" literally, thereby concluding that foremen and other supervisors were entitled to the Act's protections.

Congress picked up the Court's cue when it enacted the 1947 amendments to the Act. As a matter of policy, the Congress felt that employers should not be forced into having unionized supervisors.

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with " our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."

1 Legis. Hist. 305. The legislative history of Sections 14(a) and 2(3) clearly indicates that the purpose of these provisions was to reverse the result of the *Packard* case so that no employer would be required under the Act to bargain collectively with his foremen or to hire foremen who were union members.

"What the bill does is to say • • • [t]hat no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust."

1 Legis. Hist. 308. (Emphasis in original.) See also Int. Ladies' Garment Wkrs Union v. NLRB, 2 Cir., 339 F.2d 116, 122 (1964). In the words of the Senate Report:

"It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees."

## 1 Legis. Hist. 411.

While Section 14(a) provides that "no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining," it also expressly provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization \* • •." The purpose of this provision is also clear from the legislative history.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. " ""

## 1 Legis. Hist. 30S.

"• • It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the Maryland Drydock case • • •. In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. • • • ".

# 1 Legis. Hist. 411.

The legislative history of Section 14(a) is important in two respects. First, it is clear that the supervisory exclusion was enacted precisely because Congress assumed that when supervisors became union members they were "obligated to those on the other side" and were "subject to the influence and control of the rank and file union." And Congress solved the conflict of loyalties problem by giving management the right to make the would-be supervisor choose between union loyalty and rank-and-file status on the one hand and management loyalty and supervisory status on the other.

Second, by expressly providing that foremen could unionize, and by indicating that employers who so desired could

continue to bargain collectively with supervisors, Congress effectively gave employers an option. Those who wished to do so could continue to hire union members as supervisors and could continue to engage in collective bargaining with supervisors, resolving whatever conflict of loyalties problems arose through the traditional give-and-take of collective bargaining approved in Jones & Laughlin Steel Corp., supra, to arrive at contract clauses dealing with the problem. See page 36 supra. On the other hand, those employers who wanted to settle the conflict of loyalties problem once and for all would be within their rights in refusing to hire union members as supervisors and refusing to engage in collective bargaining with supervisors.

This option approach to an employer's rights under Section 14(a) has received the tacit approval of the courts. For example, a union commits no unfair or unlawful act in proposing that supervisors be covered by the collective bargaining agreement, Sakrete of Northern California, Inc. v. NLRB, 9 Cir., 332 F.2d 902, 908 (1964), cert. denied, 379 U.S. 961 (1965), but a union does commit an unfair labor practice in trying to coerce an employer into agreeing to hire only union members as foremen. See Int. Typographical Union Local 38 v. NLRB, 1 Cir., 278 F.2d 6 (1960), affirmed by equally divided Court, 365 U.S. 705, 707 (1961). An employer is within his rights in refusing to engage in collective bargaining over supervisors, cf. Safeway Stores, Inc. v. Retail Clerks Int. Assn, 41 Cal.2d 567, 261 P.2d 720 (1953), and supervisors are routinely excluded from a certified bargaining unit at the employer's request. Sec, e.g., Federal Compress & Warehouse Co. v. NLRB, 6 Cir., 398 F.2d 631 (1968); NLRB v. Corral Sportswear Co., 10 Cir., 383 F.2d 961 (1967). On the other hand, courts have approved contracts in which management agreed to hire only union members as foremen and where the conflict of loyalties problem was resolved by clauses in the collective bargaining agreement limiting the union's right to discipline

supervisor-members. See, e.g., NLRB v. News Syndicate Co., 2 Cir., 279 F.2d 323 (1960), affirmed, 365 U.S. 695 (1961). Cf. Evening Star Newspaper Co. v. Columbia Typographical Union No. 101, D. D.C., 141 F.Supp. 374 (1955), affirmed, 98 U.S.App.D.C. 206, 233 F.2d 697 (1956).

In applying this option approach, it has always been assumed, consistent with the legislative history, see page 38 supra, that once an employer permits his supervisors to join unions or agrees to engage in collective bargaining with unionized supervisors, he no longer can claim their undivided loyalty in every employer-union dispute except to the extent that the collective bargaining agreement ensures such loyalty. See, e.g., NLRB v. News Syndicate Co., supra, 279 F.2d at 330:

not subject to the conflicting obligations of two masters. Regardless of the Union obligations to which, without more, a foreman would be subject by reason of his Union membership, \* \* \* the contract specifically provides that: 'The Union shall not discipline the foreman for carrying out the instructions of the publisher or his representative in accordance with this agreement.' \* \* By these provisions the parties clearly indicated that the foremen are solely [this emphasis in original] the employers' agents and that they are under an obligation to act in accordance with the agreement, in spite of Union ties and obligations which otherwise might control. \* \* "

(Emphasis added; footnote omitted.) See also NLRB v. News Syndicate Co., 365 U.S. 695, 701 (1961); Int. Typographical Union Local 38 v. NLRB, supra, 278 F.2d at 12. Cf. Local Union No. 1055 v. Gulf Power Co., N.D. Fla., 175 F.Supp. 315 (1959); Safeway Stores, Inc. v. Retail Clerks Int. Assn., supra. And, until now, it seemed that

<sup>&</sup>lt;sup>24</sup> Prior to enactment of the 1947 amendments, the Retail Clerks International Association represented store managers for collective bargaining purposes, and these managers were

the Board shared this assumption. To justify its holding that certain supervisors could actively participate in union affairs, the Board recognized that supervisor-members "owe allegiance at least as much to the Union as to their employers. They are agents of both." Nassau and Suffolk Contractors' Assn, Inc., 118 NLRB 174, 182 (1957).

Thus, while now purporting to interpret Section 8(b)(1) (B) so as to enforce the underlying policy of Section 14(a) in favor of management's right to loyal supervisors, the Board in fact acts contrary to the very assumption engendering enactment of Section 14(a), namely, that when a supervisor joins a union he is under certain obligations to the union which conflict with his loyalty to his employer.

Throughout the lengthy discussion of supervisor-union member conflict of loyalties in the legislative history of the 1947 amendments, there is not a single indication that Section 8(b)(1)(B) was in any way related to the comprehensive solution to the conflict of loyalties problem found in

covered by collective bargaining agreements. In 1949, after passage of the amendments, new contract negotiations came up and Safeway announced its intention not to bargain with respect to managers any more and not to recognize the union as their representative. The union struck over this point, the trial court enjoined the strike, and the California Supreme Court affirmed:

managers] would under union rules be in duty bound to advance the cause of the community of interest of store managers and clerks in any dispute or disagreement with their principal. They would be under constant apprehension of the penalties under union rules, such as fines, suspension, or expulsion. It is eminently proper that management supervisors, the store managers in this case, be kept free from the divided loyalty that would be engendered by compulsory membership in the defendant local unions. \* \* \* \*"

Sections 2(3) and 14(a). Section S(b)(1)(B) was intended to deal with a problem separate and distinct from the problem of supervisor-union member conflict of loyalties, as is evident from the different scopes of the Section 2(3) supervisor exclusion and Section S(b)(1)(B). The supervisor exclusion in Section 2(3), defined in Section 2(11), applies not only to individuals having authority to "adjust [employee] grievances," but also to any individual "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees. The scope of Section S(b)(1)(B), in contrast, is much narrower, and concerns only those individuals who represent the employer "for the purposes of collective bargaining or the adjustment of grievances." Since the scope of Section S(b)(1)

<sup>25</sup> That the supervisory exclusion in §§ 2(3) and 14(a) is unrelated to the & S(b) (1) (B) unfair labor practice provision is further confirmed by the legislative history. Sections 2(3) and 14(a) of the 1947 amendments had their forcrunners in the Case bill passed by both houses of Congress in 1946 but vetoed by President Truman. Sec H.R. 4908, 79th Cong., 2d Sess. (Jan. 14, 1946). Section 9(a) of the Case bill, just like the 1947 amendments, amended § 2(3) of the Act by adding supervisors as a class of individuals excluded from the statutory definition of "employees." Section 9(c) of the bill, just like amended § 14(a) in 1947, provided that "[n]othing herein shall prohibit a supervisory employee from becoming or remaining a member of a labor organization." The legislative history of the 1947 amendments clearly shows that \$\$ 2(3) and 14(a) in the 1947 amendments merely sought to recenact the provisions of the Case bill- the only difference being a minor one in the definition of supervisors. Compare 1 Legis. Hist. 308 with S. Rep. No. 1177. 79th Cong., 2d Sess., at 9-10, 17-19 (1946). Compare § 2(11) of the Act, 29 Ul.S.C. § 152(11), with § 9(b) of the Case bill, H.R. 4908, supra. What is significant for present purposes is that the Case bill, while containing virtually identical forerunners of §§ 2(3) and 14(a), did not contain any provision even remotely similar to §8(b) (1) (B).

(B) is narrower than that of the supervisor exclusion in Section 2(3), the Board's approach achieves the anomalous result of having certain supervisor-members—those coming within the definitions of both Sections 2(3) and 8(b)(1)(B)—immune from all union discipline where there is a dispute between the union and the employer, while other supervisor-members—those coming within the definition of Section 2(3) but falling outside the definition of Section 8(b)(1)(B)—remain subject to union discipline. Such a dichotomy is awkward on its face, and makes no sense if one accepts the Board's assumption that under Section 14(a) a supervisor owes his undivided loyalty to his employer not only where his employer exercises his right to refuse to hire union members as supervisors, but also where the employer permits supervisors to join unions.

Not only is there no indication of any legislative purpose to make Section S(b)(1)(B) an integral part of the solution to supervisor-union member conflict of loyalties problems, but the result achieved by the Board's interpretation of Section 8(b)(1)(B) is clearly inconsistent with the concept of union membership as understood by Congress. The "contractual conception of the relation between a member and his union widely prevails in this country..."

NLRB v. Allis-Chalmers Manufacturing Co., supra, 388 U.S. at 182, quoting Int. Assn. of Machinists v. Gonzales, 356 U.S. 617, 618 (1958).

"The rationale of the contract theory is that a member, by joining the union, enters into a contract, the terms of which are expressed in the union constitution and by-laws. The member consents to suspension or expulsion according to the provisions of that contract." ""

Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1054 (1951).26 The Board's immunity from

<sup>&</sup>lt;sup>26</sup> Compare this conception of union membership with that of counsel for the charging party in *Illinois Bell*, who char-

union discipline for strikebreaking supervisors makes a shambles of the mutuality of obligation implicit in the contract approach to union membership. "Strikebreaking is uniformly considered sufficient reason for expulsion \* \* \* for it undercuts the union's principal weapon and defeats the economic objective for which the union exists." NLRB v. Allis-Chalmers Manufacturing Co., supra, 3SS U.S. at 181-182 n.S, quoting Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 495 (1950).

In addition, the Board's interpretation of Section 8(b) (1)(B) reaches a result inconsistent with ordinary standards of equity and fairness. In Illinois Bell, for example, the employer recognized the union as the exclusive bargaining agent for some of its supervisory personnel. These supervisors directly benefit from union membership, not just from the fringe benefits available to all union members, but from the contract which the union negotiates with management. True, the present contract does not determine their wages, but these employees do benefit from other contract provisions such as that establishing vacation rights. These supervisors might benefit from a suc-

acterized the union's oath of allegiance required of new members as "mumbo jumbo in the union hall \* \* \*." Transcript of hearing at 392. As to counsel's suggestion that the union security clause forced employees to take an oath of allegiance to the union, see Local Union No. 749, Int. Brhd of Boilermakers, etc. v. NLRB, - U.S.App.D.C. -, 466 F.2d 343 (1972), cert. denied, — U.S. —, 41 U.S. L. WEEK 3447 (Feb. 20, 1973), which held that a union may not lawfully request an employer with whom it has a union security agreement to fire an employee who, although willing to pay the requisite union dues and fees, refuses to assume formal union membership by signing the union's membership application card. See also NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); Union Starch & Refining Co. v. NLRB, 186 F.2d 1008, cert. denied, 342 U.S. 815 (1951). Cf. note 27 infra.

cessful strike, for example, if the purpose or result of the strike was to obtain longer vacations or to improve some other condition of employment applicable to all members of the bargaining unit, supervisory or rank and file. Can it fairly be said that Congress intended that supervisormembers can perform rank-and-file struck work, undercuting a strike from which they serve to benefit, and remain immune from union discipline while all other members of the bargaining unit remain bound by the majority decision of the union to go out on strike?

The inequity in the Board's approach to Section 8(b)(1) (B) may well have been tacitly conceded by both the Board and the employer in Florida Power when, by stipulation, it was agreed that no unfair labor practice charge would be based on union discipline of those supervisors who were members of the bargaining unit and who had their wages and conditions of employment determined by the collective bargaining agreement. See note 8 supra. Were the Board to have applied Section S(b)(1)(B) to union discipline of these supervisor-members, the Board would have prevented the union from disciplining strikebreaking supervisors whose very wages were the subject of the ongoing strike. We note, however, that nothing in the Board's approach would limit Section S(b)(1)(B) so that it would not apply to union discipline of these supervisors. The Board's position is that a union cannot fine supervisormembers for "furthering the interests of the Employer in a dispute not between the Union and the supervisor-union members but between the Employer and the Union." Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra, 192 NLRB No. 16 (slip opinion at 6). Under such an approach it is irrelevant whether or not the supervisors are members of the collective bargaining unit and whether or not their wages and conditions of employment are negotiated for them by the union. That the Board places no significance on the fact that supervisors are members of the collective bargaining unit represented exclusively by the union is demonstrated in *Illinois Bell* where the Board based its finding of a Section 8(b)(1)(B) violation on discipline of supervisor-members both outside and within the collective bargaining unit. See pages 9-10 supra.

Those supervisor-union members who feel that the union is not adequately representing their interests, or who feel that they do not wish to be bound to support the union in its economic disputes with management, are free at any time to resign from union membership. As the Supreme Court recently made clear, once they do so, and once they voluntarily agree to relinquish the benefits of union membership, they are no longer subject to union discipline. See NLRB v. Granite State Joint Board, supra; id. at 218 (Mr. Chief Justice Burger, concurring). But it is unreasonable for supervisors to expect to be able to enjoy either the fringe or the direct benefits of union membership without bearing the obligation of supporting the union in its economic disputes with the employer. 28

<sup>&</sup>lt;sup>27</sup> Nor is it significant that the collective bargaining agreement in Illinois Bell contains a union security clause. That clause, like the union security clause in Granite State Joint Board, requires as a condition of employment that members of the bargaining unit remain union members in good standing, but provides that an employee shall be deemed to be a member in good standing "so long as he pays or tenders to the Union an amount equal to the regularly recurring monthly Union dues \* \* \*." We intimate no views concerning a union's power to discipline members where a security clause in the collective bargaining agreement purports to require active union membership as a condition of employment. See also Local Union No. 749, Int. Brhd of Boilermakers, etc. v. NLRB, supra note 26, — U.S.App.D.C. at — n.3, 466 F.2d at 345 n.3.

<sup>28 &</sup>quot;I question that Congress intended by Section 8(b) (1) (B) to compel unions to retain representatives of manage-

See NLRB v. San Francisco Typographical Union No. 21, 9 Cir., — F.2d —, — (Nos. 71-2949 & 71-2987, decided May 18, 1973) (slip opinion at 4).

The lack of equity and fairness in the Board's approach is also evident when we look at the situation from the employer's perspective. Section 14(a) gives the employer a means to obtain the undivided loyalty of his supervisors. If the employer, however, chooses not to exercise his rights under that section, permits his supervisors to join unions and agrees to engage in collective bargaining with the union over supervisors, the employer cannot still insist on the supervisors' undivided loyalty in every union-employer dispute, no matter how unrelated the subject of that dispute is to the supervisory function. The employer, of course, benefits from having supervisors continue membership in unions. He can follow the commendable practice of elevating supervisors from the rank and file, without having to compensate these supervisors for any loss in pension or death benefit rights they would incur were the employer to exercise his Section 14(a) rights and force them to resign from union membership upon achieving supervisory status.29 Management cannot have its cake and cat it too. As Professor Gould has pointed out:

" \* \* [S]upervisors who remain union members are, most often obtaining additional benefits. Fre-

ment on their membership rolls. It appears to me that individuals who aspire to be representatives of management and to receive the perquisites of management must be prepared to relinquish the benefits afforded by union membership. If they elect to eat the icing, they should eat the cake; if they choose union membership, they choose to abide by its constitution." Local Union No. 2150, Int. Brhd of Electrical Wkrs, 192 NLRB No. 16 (trial examiner's decision at 6) (1971).

<sup>&</sup>lt;sup>29</sup> This was apparently what motivated Illinois Bell to permit District Superintendents to remain union members. See text at p. 10 supra.

quently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the Allis-Chalmers rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign."

Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis Chahners, 1970 Duke L. J. 1067, 1129.

This is not to say, of course, that by permitting his supervisors to join unions the employer completely waives his right to their loyalty. Even if he permits them to join unions, Section S(b)(1)(B), as interpreted by Oakland Mailers and Meat Cutters, immunizes them from union discipline imposed for the manner in which they perform their supervisory functions. In addition, the employer is free to seek further immunity from discipline through the collective bargaining process. For example, if the employer shares the Board's fear that when supervisors are forced not to perform rank-and-file struck work they become biased against the employer in the later performance of their supervisory functions, the employer may condition his permission for supervisors to remain union members upon the union's agreeing to a bargaining contract clause that immunizes supervisors from union discipline for performing rank-and-file struck work. As we have already seen, such an agreement by which the employer permits supervisors to join unions upon condition that the union give up part of its control over the supervisors is a mode of dealing with the problem of supervisor conflicts of loyalty that, in contrast to the Board's approach, has a firm basis in history both before and after passage of the 1947 amendments. Not only is it historically sound, but it comports with the Act's pervasive focus on collective bargaining as the means for resolving labormanagement conflicts. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, (1937). Where the employer has bargained for immunity from union discipline for his supervisors, such a clause may be enforced through the normal grievance adjustment procedure or arbitration machinery established in the contract to resolve alleged contract violations.30 But where the employer has agreed to union membership for his supervisors without obtaining in return some concession from the union with respect to the immunity of supervisors from discipline, interpreting Section S(b)(1)(B) so as to make the supervisor subject to an undivided loyalty to his employer in all union-employer disputes permits the employer to abrogate its part of the bargain. We can "discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." Scofield v. NLRB, supra, 394 U.S. at 433.

To be sure, the Labor Board is entitled to great deference when it interprets the act it administers. Sec, e.g., Brooks v. NLRB, 348 U.S. 96 (1954); Republic Aviation Corp. v. NLRB, 321 U.S. 793 (1945). But this deference has its limits. In the final analysis, "administrative ex-

<sup>&</sup>lt;sup>30</sup> Accordingly, we need not decide in these cases whether in disciplining supervisors the unions violated provisions of the collective bargaining agreement (or the Letter of Understanding in *Illinois Bell*) which might be read to restrict the union's right to discipline supervisors. See text at pp. 7. & 10 supra.

perience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself • • • "SEC v. Chenery Corp., 332 U.S. 194, 215 (1947) (Mr. Justice Jackson, dissenting).

Where, as here, the Board's interpretation of the statute cannot be derived from the statutory language or from prior Board precedent, and where that interpretation conflicts with Supreme Court precedent, with the legislative history, and with basic principles of fairness, the Board acts outside the law. Section S(b)(I)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work.

Reversed and remanded.

LEVENTHAL, Circuit Judge, with whom Circuit Judge McGowan joins, concurring: I concur in the opinion for the court authored by Judge Wright, which includes what I think are the salient points of this case. My separate word is not in derogation of that opinion but is added, first, to note that the same result obtains even if there should be disagreement with some aspects of the court's opinion, and second because I think the soundness of our result is underscored by thinking of this case in a large context of Congressional policy on upward mobility of labor.

Congress did not accept the view that supervisors, such as foremen, are necessarily and for all purposes to be

identified as completely integrated in management. Foremen are officers of management, but of a special kind; like non-commissioned sergeants, they bear a special relationship to the employee troops, one that promotes twoway communication and working relationships, and is of unique value to the entire enterprise.

There would be no problem if Congress had accepted a clear-cut view of foremen, as wholly integrated with management. This they could have done, by excluding foremen from employees' unions, or removing them from any union discipline, a course that was counseled in the name of good sense. But as in so many other aspects of labormanagement legislation, Congress was more interested in an accommodation of tensions than the tidiness of abrupt solutions.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> See Statement of Senator Ball, II Legislative History of the Labor Management Relations Act, 1947 (N.L.R.B. 1948) at 1524, quoted in Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 381 n.16, 458 F.2d 974, 980 n.16 (1972).

<sup>&</sup>lt;sup>2</sup> In Carpenters' Union v. Labor Board, 357 U.S. 93, 99-100, Mr. Justice Frankfurter described the compromises inherent in the Taft-Hartley Act, and the judicial path to observing them, as follows:

It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the

One thing Congress did do was to give a complete option to any employer who placed paramount value on complete and unquestioned loyalty in the foreman. That employer has the absolute and unqualified right to insist that no foreman or supervisor be a member of an employee's union. § 14(a), 29 U.S.C. § 164(a) (1970).

Such an employer attitude, however, involves costs to the employer who appreciates the benefits to the enterprise from the upward mobility of labor. Not a few enlightened managements are on the lookout for talent in the ranks, able to infuse management levels with the special awareness, aptitudes and attitudes of production experience.

Mobility of union labor is restricted if departure from the union means surrender of existing or prospective economic benefits. Such surrender requirements are not a rarity in the various benefit and insurance plans sponsored by labor unions. Congress might conceivably have required that such plans be revised so as to "vest" economic benefits on reasonable terms. But it has not yet even required vesting in the more glaring case of employer pension plans, which often remove pension rights on transfers to other employers, thus limiting mobility of labor.<sup>3</sup>

business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern "brain" machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials.

<sup>&</sup>lt;sup>2</sup> Roark v. Boyle, 142 U.S.App.D.C. 390, 397-98, 439 F.2d 497, 504-05 (1970).

The option given by Congress is an accommodation to employers, enabling them to permit their supervisors to stay on as members of an employers' union, without surrender of the economic benefits available to members of the union.

The foremen who are permitted by their employers to maintain membership in the ranks of both union and management will have dual ties, and there is the prospect of clash and tension. That tension may not be entirely felicitous so far as management is concerned, but when elected by the employer it reflects a trade-off, making it preferable to available alternatives.

The employer is protected by the statute against the coercion implicit in certain union exercise of control over members. The clear language of the statute protects supervisors against disiepline as union members, and means the control of the union must give way, when there is a question of union control over the choice of a supervisor, or interference with the performance of the supervisor in "adjusting grievances."

Whether or to what extent this approach may be extended to limit union control over members in other respects, it cannot be extended to the cases before us, which lie at the opposite end of the spectrum. A union member who performs rank-and-file struck work executes an act which is inherently destructive of the existence of the union. In contemplating that supervisors might continue as members of the union, Congress did not contemplate that the unions would have to surrender the elemental right

See cases cited in the majority opinion at p. 14.

<sup>&</sup>lt;sup>6</sup> San Francisco-Oakland Mailers' Union No. 18, 172 NLRB No. 252 (1968).

of self-preservation, and to continue the good standing of agents of its own destruction.

This case does not involve a management instruction to a foreman to perform managerial or supervisory work. Indeed Illinois Bell did not issue any instruction relative to the supervisors to work during the strike. If the management wishes to take the position that even rank-and-file work is the duty of a supervisor during a strike, then that is such an incursion on a union's elemental right of self-preservation as to require management to prohibit the supervisor from remaining with the union. A management insisting on absolute loyalty, to such an extent, must bear the potential expense of the economic rights supervisors will surrender by withdrawing from the union.

I do not take Meat Cutters, supra note 1, to be in conflict with this view. That case involved the implementation by a manager of a Safeway store of a company directive to terminate the grinding and slicing of certain meats at the retail stores, and to henceforth fill market needs by

<sup>\*</sup>See Allis Chalmers, 388 U.S. 175, 181-82 (1967), where the Court observed that "'[t]he power to fire or expel strike-breakers is essential if the union is to be an effective bargaining agent...'", citing Summers, Legal Limitations on Union Discipline, 64 HARV L. REV. 1049 (1951). It then noted that "Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strike-breakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments."

Similarly, the 1947 Taft-Hartley Act language including the ban on secondary boycotts was not applied literally, but was held to be subject to an implied exception excluding from the ban the traditional weapon of primary picketing. NLRB v. International Rice Milling Co., 341 U.S. 665, 670-71 (1951). This approach was confirmed in the 1959 amendments. Grain Elevator, Flour & Feed Mill Workers v. NLRB, 126 U.S.App.D.C. 219, 223-224, 376 F.2d 774, 778-79 (1967).

ordering meat in prepared form from a warehouse. While the implementation of this management decision had the effect of eliminating some work for the Union Local S1, it was not inherently destructive of the Union. Without reconsidering the broad sweep of the doctrines of "indirect" interference and management loyalty voiced in Meat Cutters, they must be taken in the light of the factual problem then before the court, and cannot soundly be extended so as to prohibit union discipline of supervisors who perform rank-and-file struck work.

The limits on the protection for management loyalty are clearly posed by these cases, and reflect, I believe, an underlying congressional policy on the question of upward mobility in the labor market. Congress permits the employer to permit a rank-and-file worker to upgrade his employment situation by becoming a supervisor without surrendering certain rights as a member of an employees union. When, however, the transition is complete, and the supervisor is to side with management over the very existence of the union, the supervisor and management must make a choice and assume the consequences.

MacKinnon, Circuit Judge, with whom Tamm, Roeb and Wilker, Circuit Judges, join, dissenting: The majority expresses its approval of the Board's interpretation of section 8(b)(1)(B)<sup>1</sup> as set out in Oakland Mailers and its

It shall be an unfair labor practice for a labor organization or its agents—

<sup>147</sup> U.S.App.D.C. at 378 n. 7, 458 F.2d at 797 n.7.

<sup>29</sup> U.S.C. § 158(b) (1) (B) (1970) provides:

<sup>(1)</sup> to restrain or coerce \* \* \* (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

progeny. In Oakland Mailers the Board held illegal union actions which "were designed to change the (employer's) representatives from persons representing the viewpoint of management to persons responsive or subservient to (the union's) will." In reaching the conclusion that the union's imposition of discipline on supervisors because of the manner in which they interpreted and applied the collective bargaining agreement violated section 8(b)(1) (B), the Labor Board noted:

In enacting Section S(h)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [employer's] control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them.

Thus, there is unanimous agreement on this court that section S(b)(1)(B) prohibits union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties. However, there is considerable disagreement as to whether a supervisor's performance of rank-and-file work during a strike at the direction of his employer constitutes part of his supervisory or managerial duties protected by section S(b)(1)(B). Basically the majority's position is that the Board has stretched section S(b)(1)(B) to the breaking point, in light of the

<sup>&</sup>lt;sup>2</sup> San Francisco-Oakland Mailers' Union No. 18, 172 NLRB 2173 (1968).

<sup>&</sup>lt;sup>3</sup> Id. (emphasis added). See New Mexico District Council of Carpenters, 177 NLRB 500, (1969), enfd., 454 F.2d 1116 (10th Cir. 1972).

legislative history of that section and sections 2(3)<sup>4</sup> and 14(a),<sup>5</sup> and the Allis-Chalmers case, when it has sought to prohibit the union discipline of these supervisors. I find many defects in the majority's analysis, and shall deal with the pertinent statutes and legislative history first, and take up the Allis-Chalmers case lastly.

#### T.

Underlying much of the majority's criticism of the Board's decision is the belief that a strike is "totally unre-

## <sup>5</sup>29 U.S.C. § 164(a) (1970) provides:

<sup>429</sup> U.S.C. § 152(3) (1970) provides:

<sup>(3)</sup> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

<sup>(</sup>a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

lated" to the collective bargaining process. Thus, the majority argues that even if the union's discipline here has the effect of making a supervisor pro-union during the strike, it "does not follow that this change in attitude will affect his performance of his collective bargaining or grievance adjustment function." This is because, it is argued, when a supervisor performs rank-and-file work during a strike at the direction of his employer "he is no longer acting as a management representative." Whereas, when a supervisor performs his normal supervisory work, engages in collective bargaining, or adjustment of grievances, he is clearly acting as a management representative. Since, in the majority's view, performing struck work during a strike at the request of management is "unrelated" to the performance of his supervisory function, a supervisor will never be forced into the situation of having to serve two masters, as the Board found would be the case-for he "will be serving them at different times."

The majority's reasoning ignores the realities of the collective bargaining process. A strike is not "totally unrelated" to the supervisor's performance of collective bargaining functions. As the Board argued before this court, "the outcome of an economic strike . . . determines the substance of an agreement between the disputing parties and is thus a far more fundamental dispute, and one with more at stake, than a quarrel over the interpretation of a portion of a previously negotiated agreement or over its application to a given situation or individual."7 It is well recognized that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477, 495 (1960) (emphasis added). It is readily apparent,

Brief for the National Labor Relations Board at 15-16.

therefore, that when supervisors' actions during an economic strike further the interests of their employer, they are performing in a manner which could reasonably be expected from such persons. See Local Union No. 2150, I.B.E.W., 192 NLRB No. 16 (1971). See also, Texas Co. v. N.L.R.B., 198 F.2d 540 (9th Cir. 1952). As management representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular union involved. Yet this is the precise activity for which the supervisors in question were disciplined by these unions.

Not only has the majority taken an unrealistic look at the role of a strike in the collective bargaining process, it completely disregards the Labor Board's assessment of what will be the realistic consequences of union discipline of supervisors during confrontations between the union and the employer. In both these cases the Board relied on its analysis of the same issue in Local Union No. 2150, I.B.E.IV., decided the same day as Illinois Bell Telephone, wherein the Board found that

[t]he Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer has a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it has selected to act as its collective bargaining agents

<sup>\*</sup>There is no question that supervisors enhance the bargaining position of their employer when they perform rankand-file work during a strike, since their actions reduce the severity of the economic pressure borne by their employer as a result of the work stoppage.

or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its representatives.

The Labor Board has drawn an inference from the evidence before it, concluding that the unions' discipline of these supervisors will interfere with the performance of their supervisory duties. Such inferences are not to be disturbed by a reviewing court merely because in its own opinion it disagrees with the rightness of the Board's judgment. Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 48-50 (1954); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488, 490 (1951); N.L.R.B. v. Nevada Consolidated Copper Corp., 316 U.S. 105 (1942). Rather, as with other findings of fact, the proper test is whether the inference is supported by substantial evidence in the record. And under this standard, I see no reason to disagree with the Board's assessment of the effect of the union discipline upon the supervisor-employer relationship.

Further, the majority embraces a rule which makes the type of work a supervisor performs during a strike the determinative factor in section S(b)(1)(B) cases involving the legality of union discipline. This distinction makes no sense from the standpoint of the Congressional purpose underlying sections S(b)(1)(B), 2(3), and 14(a). The Board's present interpretation of section S(b)(1)(B) was

Local Union No. 2150, I.B.E.W., 192 NLRB No. 16, slip op. at 6-7 (1971) (emphasis added). See New Mexico District Council of Carpenters, 177 NLRB 500, 502 (1969), enfd., 454 F.2d 1116 (10th Cir. 1972); Meat Cutters Local Union No. 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 379-80, 458 F.2d 794, 798-99 (1972); N.L.R.B. v. Locals Nos. 15-P and 272, Lithographers, 437 F.2d 55, 57 (6th Cir. 1971); N.L.R.B. v. Sheet Metal Workers, Local 49, 430 F.2d 1348, 1349 (10th Cir. 1970).

set out in Local Union No. 2150 I.B.E.W., wherein it quoted from Toledo Blade:

The Board's decision in the San Francisco Mailers case, underscores the . . . import of Section S(b)(1)(B) as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers. As the Board held, such discipline by a union, even though the employer may have consented to the compulsory union membership of the supervisor under a union-security clause, is an unwarranted "interference with [the] employer's control over its own representatives," and deprives the employer of the undivided loyalty of the supervisor to which it is entitled.<sup>10</sup>

When a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline equally interferes with the employer's control over his representative and equally deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties. Thus, if the Board's construction of section 8(b)(1) (B) can be sustained, the majority's distinction of the type of work the supervisor performs during the strike would be without justification.

The Board's construction of S(b)(1)(B), as prohibiting union discipline of supervisors for furthering the interests of their employer during disputes between the union and the employer, rests upon the legislative history of that section, and sections 2(3) and 14(a). The Supreme Court has recognized the fact "that labor legislation is peculiarly the product of legislative compromise of strongly held views, Local 1976, Carpenters' Union v. Labor

<sup>&</sup>lt;sup>10</sup> Local Union No. 2150, I.B.E.W., 192 NLRB No. 16, slip op. at 5 (1971).

Board, 357 U.S. 93, 99-100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace [or not embrace] conduct called in question. National Woodwork Mfrs. Assn. v. N.L.R.B., 386 U.S. 612, 619-620." 11 When Congress was considering amendments to the National Labor Relations Act in 1947, it was acutely aware of the fact that unions had previously "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union," and through the enactment of section S(b)(1)(B) it endeavored "to prescribe a remedy in order to prevent such interferences." 12 Although this fact is highly pertinent to an evaluation of the proper scope of section S(b)(1)(B), other legislative history surrounding the 1947 amendments must also be considered.

Section 8(b)(1)(B) must not be interpreted in a vacuum, but must be interpreted in conjunction with the other 1947 amendments to the N.L.R.A. relating to supervisory personnel.<sup>13</sup> The fact that Congress decided to expressly exclude "supervisors" from the statutory definition of "employee" in section 2(3) is highly informative.

Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection

<sup>&</sup>lt;sup>11</sup> N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179 (1967).

<sup>&</sup>lt;sup>12</sup> 93 Cong. Rec. 4266 (1947) (remarks of Sen. Ellender), in II Legislative History of the Labor Management Relations Act, 1947 at 1077.

<sup>&</sup>lt;sup>13</sup> See sections 2(3), 2(11) and 14(a), 29 U.S.C. §§ 152 (3), 152(11) and 164(a) (1970).

of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations. See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); L.A. Young Spring & Wire Corp. v. National Labor Relations Board, 1947, 82 U.S.App.D.C. 327, 163 F.2d 905, certiorari denied 1948, 333 U.S. 837

In Meat Cutters we considered this prior analysis of the 1947 legislative history and concluded that "[a] supervisor's obligations to his union simply cannot detract from the absolute duty, evidenced by section 8(b)(1)(B), which he owes to his employer when exercising his managerial authority." 15

The majority correctly recognizes that sections 2(3) and 14(a) were expressly enacted to resolve the conflict of loyalties problem resulting from unionization of supervisors. However, it has completely misinterpreted the legislative solution to that problem which Congress enacted in sections 2(3) and 14(a). There is just no support in the language of those sections or in the legislative history for the majority's interpretation that "Congress effectively gave employers an option" to prohibit unionization thereby ensuring undivided loyalty, or to permit unionization and thereby accept divided loyalty from their supervisors. What Congress did do in sections 2(3) and 14(a) was to solve the conflict of loyalties problem once and for all by taking supervisors completely out of the operation of the Act. Congress provided that there was nothing intended to prevent unionization of supervisors, even in

<sup>&</sup>lt;sup>14</sup> Carpenters Dist. Council of Milwaukee v. N.L.R.B., 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959) (emphasis added).

Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App.
 D.C. 375, 381, 458 F.2d 794, 800 (1972).

rank-and-file unions, but even if unionized supervisors were to enjoy no protection from the Act. Congress did not give employers the means to opt for the undivided loyalty of their supervisors—it guaranteed it itself by enacting sections 2(3) and 14(a).

By the very terms of section 2(3), supervisors, as defined in section 2(11),16 are excluded from the statutory definition of "employee", and thus taken out of the operation of the Act. This was the legislative solution to the conflict of loyalties problem experienced when supervisors unionized-thereby incurring certain rights under the Act and at the same time being subjected to union influence. Congress concluded that supervisers should be considered to be a part of management, and that the only way to guarantee the undivided loyalty of supervisors to their employer was to take them out of the operation and protection of the Act. Thus, the Senate Report, in noting what major changes the Taft-Hartley Bill would make in the National Labor Relations Act, stated, "It eliminates the genuine supervisor from the coverage of the act as an employee and makes clear that he should be deemed a part of management." S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947), in I Legislative History of the Labor Management Relations Act at 409 [hereinafter cited as Legis. Hist.]. Similarly, the House Report noted that

<sup>36 29</sup> U.S.C. § 152 (11) (1970) provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct then, or to adjust grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"[s]upervisors are management people," and concluded that

Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.

H. R. Rep. No. 245, 80th Cong., 1st Sess. 15-16 (1947), in I Legis. Hist. at 306-307 (emphasis in original). The legislative understanding was that even if supervisors organized, they were to be considered "management people" outside the operation of the act.

The explanatory comments of committee members also support this interpretation. Senator Taft explained:

It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various inbetween steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate foremen's union not affiliated with the men's unions, but it was found that that was almost impossible; that there was always an affiliation of some sort; that foremen, in order to be successful in a strike, must have the support of the employees' union. A plant can promote other men to be foremen if necessary. The tie-up with the employees is inevitable. The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States.

93 Cong. Rec. 3952 (1947), in II Legis. Hist. at 1008-1009 (emphasis added). Likewise, Sen. Ball commented:

The committee took the position that foremen are an essential and integral part of management, and

that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free-enterprise system. It might be stated that both the House and Senate bills deal with that subject in substantially the same way.

93 Cong. Rec. 5146 (1947), in II Legis. Hist. at 1496. Sce also, 93 Cong. Rec. A2012-13 (1947) (remarks of Rep. Meade), in I Legis. Hist. at 868-69; 93 Cong. Rec. 4411 (1947) (remarks of Sen. Smith), in II Legis. Hist. at 1148; 93 Cong. Rec. 4260 (1947) (remarks of Sen. Ellender), in II Legis. Hist. 1064-65.

The majority finds its option argument in the language and legislative history of section 14(a). Of course, the legislative history of that section is intimately bound up in that of section 2(3), and cannot be looked at separately. The legislative history clearly indicates that section 14(a) was intended to do nothing more than make clear that an employer could not be compelled to treat his supervisors like other statutory "employees," even if they remained in the union. This follows directly from the exclusion of supervisors from the definition of "employee" in section 2(3). There is just nothing in the legislative history to indicate that Congress assumed that if an employer permitted his supervisors to remain in the union, he thereby impliedly accepted their dual loyalty.

What is eminently lucid from the legislative history is that Congress thought it was providing that even if a supervisor remained in a union, he had no protection or coverage under the act, and had to rely solely on the be-

<sup>&</sup>lt;sup>17</sup> See, e.g., S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947), in I Legis. Hist. at 411; Meat Cutters Local Union No. 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 380-81, 458 F.2d 794, 799-800 (1972).

nevolence of his employer. Thus, the House Report states, "The bill does not forbid these people [i.e., supervisors] to organize. It merely leaves their organizing and bargaining activities outside the provisions of the act." H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), in I Legis. Hist. at 314. See also, S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947), in I Legis. Hist. at 411; S. Min. Rep. No. 105, pt. 2, 80th Cong., 1st Sess. 39 (1947), in I Legis. Hist. at 501. Again, the remarks of the committee are informative. For example, Rep. Hartley noted, "This bill also exempts supervisors from the compulsory features of the National Labor Relations Act. In other words, this bill does not bar them from organizing but they cannot obtain the benefits of the act." 93 Conc. Rec. 3533 (1947), in I Legis. Hist. at 613. See also, 93 Cong. Rec. 3952 (1947) (remarks of Sen. Taft), in II Legis Hist. at 1008.

The fact that section 14(a) also provides that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization" does not in any way support the majority's option argument. This statement was not intended "to expressly provide that foremen could unionize" at the employer's will, as the majority argues, for there was nothing in the 1947 Amendments which would have prevented such unionization. The statement was without material effect, and "was included presumably out of an abundance of caution." H. Conf. Rep. No. 510, 80th Cong., 1st Sess.

<sup>18</sup> S. REP. No. 105, 80th Cong., 1st Sess. 28 (1947), in I Legis. Hist. at 434 states, "Section 14: This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity" (emphasis added).

60 (1947), in I Legis. Hist. at 564.19 This almost superfluous provision obviously cannot legitimately serve as a cornerstone for any interpretation of the legislative solution to the conflict of loyalties problem enacted by the 80th Congress.

The majority maintains that the case law has always assumed that once an employer permits his supervisors to join unions, he can no longer claim their undivided loyalty in disputes with the union. Yet the cases it cites for this proposition all pre-date the Board's decision in Oakland Mailers, wherein the Board faced the issue of union discipline of supervisors for the first time and admittedly expanded the interpretation of section S(b)(1)(B).20 The cases since Oakland Mailers indicate that merely because an employer may have consented to the compulsory union membership of his supervisors under a union-security provision does not negate his right to the full protection of section 8(b)(1)(B). See Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 458 F.2d 794 (1972); Toledo Locals Nos. 15-P and 272, 175 NLRB 1072, 1080 (1969), enfd., 437 F.2d 55 (6th Cir. 1971); Local Union No. 2150, I.B.E.W., 192 NLRB No. 16, slip op. at 5 (1971). And in Meat Cutters we specifically rejected the union's argument that section 14(a) expressed an intent to subject supervisor/members to the full control of the union,

<sup>&</sup>lt;sup>19</sup> The legislative history contains a number of references to the fact that there was no intent to prevent unionization of supervisors, but merely to take them out of the operation of the Act—thus leaving them only with self-help protections. See pp. 66-67, supra.

<sup>&</sup>lt;sup>20</sup> The Board informed us at oral argument, and my own research has not contradicted their assertion, that Oakland Mailers was the first case in which it faced the issue of the extent to which section 8(b) (1) (B) prevents union discipline of supervisors/members for performing managerial duties.

concluding that it is readily apparent "when all the relevant 1947 amendments to the Act are considered in concert, that Congress did not intend thereby to allow unions to subvert the 'undivided loyalty' it clearly believed such managerial personnel owe to their respective employers." <sup>21</sup>

In my view the Board's interpretation of section 8(b) (1)(B) as proscribing union discipline of supervisors for furthering the interests of their employer by performing struck work expressly at his request does not stretch that section to the breaking point, but is fully justified in light of the legislative history and the other sections dealing with supervisors.

#### III.

The majority attempts to draw significant support for its construction of section S(b)(1)(B) from Allis-Chalmers, which it characterizes as "indistinguishable from these cases." It is my view that a close analysis of Allis-Chalmers and Scofield 23 reveals nothing which would relieve the unions from responsibility under section S(b)(1)(B) for these fines. First, it is vitally important to remember that Allis-Chalmers involved section S(b)(1)(A), of solution of the section S(b)(1)(A). While both contain the common

<sup>21 147</sup> U.S.App.D.C. at 381, 458 F.2d at 800.

<sup>22 388</sup> U.S. 175 (1967).

<sup>23 394</sup> U.S. 423 (1969).

<sup>24 29</sup> U.S.C. § 158(b) (1) (A) (1970) provides:

<sup>(</sup>b) It shall be an unfair labor practice for a labor organization or its agents—

<sup>(1)</sup> to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

<sup>25</sup> See note 1, supra.

language "to restrain or coerce," the two provisions protect completely different interests in quite different ways. Section S(b)(1)(A) was only intended to impose some slight controls upon the union-employee relationship, and the legislative history makes clear that Congress did not intend extensive regulation of the internal union-employee/ member relationship. See N.L.R.B. v. The Boeing Co., 41 U.S.L.W. 4678, 4679 (U.S. May 21, 1973); N.L.R.B. v. Allis-Chalmers Mfg. Co., 3SS U.S. 175, 183-195 (1967). See also, National Maritime Union, 78 NLRB 971, 982-87 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950). Section S(h)(1)(B), on the other hand, was intended to regulate the external union-employer relationship. No amount of union coercion or interference with an employer's selection or control of his representatives for the purpose of collective bargaining or adjustment of grievances was permitted.

Second, in upholding the union fines in Allis-Chalmers and Scofield, while the Supreme Court did not rely upon the express language of the proviso to section S(h)(1) (A),<sup>26</sup> as the Labor Board had originally done in Minneapolis Star and Tribune Co., 109 NLRB 727 (1954), it did draw "cogent support" for its decision from it.<sup>27</sup> Sec N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 191-92 (1967); Scofield v. N.L.R.B., 394 U.S. 423, 428 (1969). Sec also, Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act; The Radations of Allis-Chalmers, 1970 DUKE L. J. 1067, 1128 (1970). The applicability of that proviso, however, is clearly limited

<sup>26</sup> Sec note 24, supra.

<sup>&</sup>lt;sup>27</sup> Compare Booster Lodge No. 405, Int. Assn. of Machinists v. N.L.R.B., 148 U.S.App.D.C. 119, 125, 459 F.2d 1143, 1149 (1972), aff'd in part, 41 U.S.L.W. 4683 (U.S. May 21, 1973) with Meat Cutters Union Local 21 v. N.L.R.B., 147 U.S.App.D.C. 375, 381, 458 F.2d 794, 800 (1972).

to section 8(b)(1)(A). It is not a part of section 8(b)(1) (B), which directly regulates only the union-employer relationship.<sup>25</sup> Therefore, to the extent that Allis-Chalmers and Scofield draw "cogent support" from that proviso for their holdings, that rationale cannot lend support to disciplining "supervisors" where the cases arise under section 8(b)(1)(B).

In the majority's view the "one thing that is clear" from Allis-Chalmers is that there is no overriding policy of the labor laws which prohibits reasonable union fines levied against its members who cross a lawful picket line to perform rank-and-file struck work. A union has a right to assure solidarity in its ranks by imposing fines to prevent strike breaking by its members. This reasoning, the majority argues, is directly applicable to the situation here. The defect in this argument is that it fails to recognize the fundamental distinction which Congress made between employees and supervisors, even if the latter were members of a union. In Allis-Chalmers the Court was faced only with the situation of union discipline of employee/members. Thus, the Court there began by noting that

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. . . . The employee may disagree with many of the union decisions but is bound by them. "The majority rule concept is

<sup>28</sup> See San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB 2173 (1968); Price v. N.L.R.B., 373 F.2d 443, 446 (9th Cir. 1967), cert. denicd, 392 U.S. 904 (1968); Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 381-82, 458 F.2d 794, 800-801 (1972). See also II Legis. Hist. at 1139, 1141, and 1200.

today unquestionably at the center of our federal labor policy." 29

It was in this context that the Court proceeded to acknowledge the importance of a union's power to discipline its members to protect against erosion of its status. "The power to fine or expel a strike breaker is essential if the union is to be an effective bargaining agent." 30

In contrast, in the instant cases we are confronted with union discipline of supervisor members, which Congress said in the Taft-Hartley amendments were to be "deemed a part of management." <sup>31</sup> It was largely for the reason that because a usual union member is subservient to the will of the majority, Congress took supervisors out of the operation of the Act—to make them subservient to the will of the employer and not the union. <sup>32</sup> Certainly management has an equal right under our federal labor policy to promote strike solidarity among its supervisory personnel as does a union to promote solidarity from its members. <sup>33</sup> Where these two rights clash, as they do here,

<sup>29 388</sup> U.S. at 180 (footnote omitted).

<sup>&</sup>lt;sup>30</sup> N.L.R.B. v. Marine Workers, 391 U.S. 418, 423 (1968) quoting from N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967).

<sup>&</sup>lt;sup>31</sup> S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947), in I Legis. Hist. at 409.

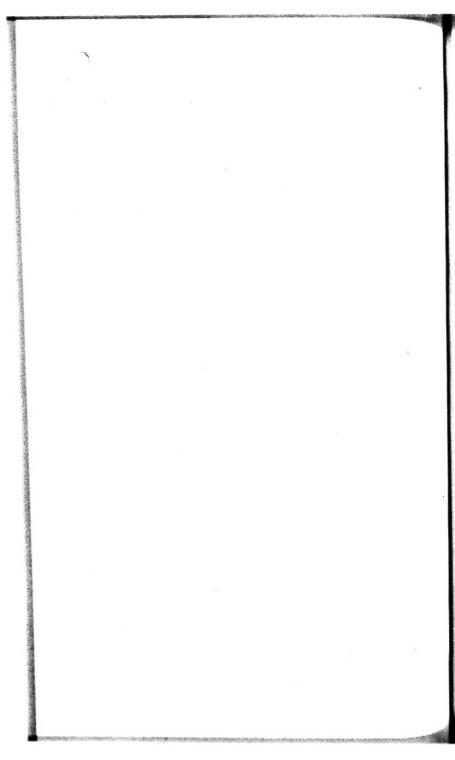
<sup>32</sup> See majority opinion at 37, supra.

<sup>&</sup>lt;sup>33</sup> The Senate Report indicates that in exempting supervisors from the operation of the Act, Congress was concerned about restoring some semblance of a balance of collective bargaining power between unions and employers. The Report found that the organization of supervisors with the resulting rights under the National Labor Relations Act "probably more than any other single factor ha[d] upset any real balance of power in the collecting-bargaining process . . . ." S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947), in I Legis. Hist. at 409.

the legislative pronouncements of sections 2(3), 14(a) and 8(b)(1)(B) indicate to me that the interest of the employer in having loyal supervisors under his control must prevail.

Further, as the majority acknowledges, Supreme Court decisions subsequent to Allis-Chalmers have emphasized that the Allis-Chalmers rationale only permits "a union • • • to enforce a properly adopted rule which reflects a legitimate union interest [and] impairs no policy Congress has imbedded in the labor laws." Scofield v. N.L.R.B. 394 U.S. 423, 430 (1969) (emphasis added), and see 394 U.S. at 429, 432. See N.L.R.B. v. The Bocing Co., 41 U.S.L.W. 4678, 4679 (U.S. May 21, 1973), N.L.R.B. v. Marine Workers, 391 U.S. 418 (1968); Booster Lodge No. 405, Int. Assn. of Machinists v. N.L.R.B., 148 U.S.App.D.C. 119, 126, 459 F.2d 1143, 1150 (1972), aff'd in part, 41 U.S.L.W. 4633 (U.S. May 21, 1973).31 And, as previously developed, sections 2(3), 14(a) and 8(b)(1)(B) do embody such a congressional policy-to ensure the undivided loyalty of supervisors to their employer without interference from unions -which would be impaired by these disciplinary fines. Whenever union action has the effect of impermissibly inhibiting an employer with respect to his choice of loyal representatives it is apparent that an express federal labor policy is being violated, and it necessarily follows that the rationale underlying Allis-Chalmers and Scofield cannot be availed to nullify the section S(b)(1)(B) violation.

<sup>34</sup> See also, N.L.R.B. v. International Molders and Allied Workers Union, 442 F.2d 92, 94 (7th Cir. 1971).



## App. 77

#### APPENDIX B

193 NLRB No. 7

D—5456 Naples-Fort Meyers, Lake City, Broward County, Sarasota-Bradenton, and Palatka Areas, Fla.

UNITED STATES OF AMERICA
BEFORE THE 
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYSTEM COUNCIL U-4, and the Following Affiliates thereof:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 641

and

Case 12-CB-1109-2

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 622

and

Case 12-CB-1116

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 759

and

Case 12-CB-1117

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 820

and

Case 12-CB-1118

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 1263

and

Case 12-CB-1119

FLORIDA POWER & LIGHT COMPANY

193 NLRB No. 7

#### DECISION AND ORDER

Upon charges duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a consolidated complaint and notice of hearing, dated July 24, 1970, against International Brotherhood of Electrical Workers System Council U-4 and certain of its affiliated local unions, to wit: International Brotherhood of Electrical Workers Local Union Nos. 641, 622, 759, 820, and 1263. The complaint alleged that the Respondents had engaged in and were engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(b) (1) (B) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges, order consolidating cases, and complaint and notice of hearing were duly served upon the parties. On August 13, 1970, Respondents filed their answer to the complaint denying commission of unfair labor practices and requesting that the complaint be dismissed.

Thereafter, the parties entered into a stipulation of facts and the issue and jointly moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and order. The parties stipulated that they waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision, and that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the charges, consolidated complaint, amendment to the consolidated complaint, and the stipulation constitute the entire record in this proceeding.

On December 3, 1970, the Board issued its order granting motion, approving stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, Respondents, and the Charging Party filed briefs in support of their positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has considered the stipulation, including exhibits, the briefs, and the entire record in this proceeding, and hereby makes the following:

# Findings of Fact

## I. The Business of the Employer

Florida Power & Light Company is a Florida corporate utility, with offices and facilities located at various places within the State of Florida, where it is engaged in the production of electricity. During the 12 months preceding the complaint, Florida Power & Light Company, in the course and conduct of its operations, received gross revenues in excess of \$500,000, and purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Florida.

The parties have stipulated, and we find, that Florida Power & Light Company is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We find that it will effectuate the purposes of the Act to assert jurisdiction herein.

#### II. The Labor Organizations Involved

The parties have stipulated, and we find, that Respondents are labor organizations within the meaning of Section 2(5) of the Act.

#### III. The Unfair Labor Practices

Respondent System Council U-4 is an unincorporated association of 11 local unions of the International Brotherhood of Electrical Workers (including those named as Respondents in this proceeding) whose members work for Florida Power & Light Company, and is an admitted agent of the Respondent Local Unions authorized to deal with Florida Power & Light Company in all matters pertaining to collective bargaining. From October 22, 1969, through December 28, 1969, Respondents were engaged in an economic strike against Florida Power & Light Company and Respondent Local Unions maintained picket lines at nearly all the Company's operational facilities. The Company's supervisors routinely crossed the picket line during the

(3)

course of the strike and performed work, including unit work, for the Company. Following the strike, in January, February, and March 1970, the Respondent Locals, with the knowledge of System Council U-4, notified the supervisors within their respective jurisdictions that charges had been filed against them for violations of the International constitution and of a Trial Board hearing date. Thereafter, various supervisors were fined in amounts ranging up to \$6,000 and/or expelled from the Union and their membership in the IBEW System Council U-4 Death Benefit Fund, Inc., a nonprofit corporation open only to members in good standing of the Respondent Local Unions, was canceled as a result of the actions of the Respondents, As a further result of Respondents' actions the supervisors in question are not eligible, under the terms of the International constitution, to apply for union pension benefits. The parties have stipulated that the supervisors were supervisors within the meaning of Section 2(11) of the Act and that they possessed authority on behalf of Florida Power & Light to adjust grievances and to act as its representatives in matters involving collective-bargaining interpretations. although three of them supervised and adjusted grievances of nonbargaining unit employees only.

The parties have stipulated that the issue to be decided by the Board is whether or not the Respondents' disciplining of certain of the Company's supervisors (see Appendix A) and causing System Council U-4 to terminate their death benefit coverage violated Section 8(b)(1)(B) of the Act.<sup>1</sup>

<sup>&</sup>lt;sup>1</sup>The Company's request to amend the complaint to allege additional violations of Section 8(b)(1)(B) and violation of Section 8(b)(2) is denied, since the parties have stipulated to the scope of the issue and there can thus be no implication that the Respondents have consented to the trial of other issues.

Respondents assert in their brief that this proceeding presents the same issues before the Board in Wisconsin Electric Power Company and Illinois Bell Telephone Company. Those issues have since been decided (192 NLRB Nos. 16 and 17) with a majority of the Board (Member Fanning dissenting) holding that a union violates Section 8(b) (1) (B) of the Act by fining supervisors for performing struck work (i.e., action taken in the employer's interest in the course of their jobs). The Board found that the fines there struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of such representatives. We reach the same conclusion here. Nor are we persuaded to a different result by the Respondents 'argument based on the parties' stipulation that union membership was voluntary and not influenced by either the Company or the Unions. The Company's acquiescence to retention of union membership by its supervisors and grievance representatives is not evidence that it is not coerced or restrained by union discipline against them for their actions on its behalf, and previously we have found such discipline unlawful even though union membership was required by the collective-bargaining agreement. E.g., Illinois Bell Telephone Company, supra. We also find no merit in Respondents' contention that no violation may be found as to those supervisors who do not adjust the grievances of, or supervise, bargaining unit employees. The degree of coercion or restraint of an employer is scarcely less because the disciplined union member has no official role to play in the relations between the union and the employer, and we have found violations in the past where there was no bargaining relationship at all between the employer and the respondent union. A. S. Horner, Inc., 177 NLRB No. 76; 176 NLRB No. 105.

We find that the Respondent Local Unions severally violated Section 8(b)(1)(B) of the Act by trying, fining and/or expelling or suspending from union membership for performing struck work, certain supervisors, as detailed in Appendix A, and by causing System Council U-4 Death Benefit Fund, Inc., to terminate death benefit coverage for certain supervisors who were so disciplined.

As to System Council U-4 we shall dismiss the complaint in its entirety. The record demonstrates only that the System Council exists for the purpose of conducting collective-bargaining negotiations with Florida Power & Light on behalf of its member Local Unions and that it is their agent for this purpose. There is no evidence that System Council U-4 participated in, or ratified, the activities of the Local Unions which we have found unlawful, nor that it plays any role in intraunion disciplinary proceedings—only that it had knowledge of the actions of the other Respondents. We are not aware of any rule of law which would render an agent liable for the actions of its principals in such circumstances.

# IV. The Effect of the Unfair Labor Practices Upon Commerce

The conduct of the Respondents set forth above, occurring in connection with the operations of the Employer as set forth in section I, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

# V. The Remedy

Having found that the Respondent Local Unions have engaged in certain unfair labor practices we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, including, as appropriate: (1) rescission of all fines and refund of any money paid to the Union as a result thereof; (2) expunging all record of the proceedings in this matter against the Employer's representatives; (3) restoration to membership and all consequent rights of the Employer's representatives, whom we have found to be unlawfully disciplined; (4) notifying the Employer's representatives and the applicable benefit plans, including System Council U-4 Death Benefit Fund, Inc., that they are in good standing and are eligible to participate; (5) notifying the Employer's representatives that all rights and benefits to which they were entitled before the unlawful action taken against them, including union membership, have been restored; (6) posting the notices attached to the Decision as appendixes.

#### Conclusions of Law

- 1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Respondents are labor organizations within the meaning of Section 2(5) of the Act.
- 3. International Brotherhood of Electrical Workers System Council U-4 did not violate Section 8(b) (1) (B) of the Act.

- 4. Those individuals listed in Appendix A have, at all material times, been representatives of the Employer selected by it, inter alia, for the purpose of dealing with matters involving collective-bargaining interpretation and adjusting grievances within the meaning of Section 8(b) (1) (B) of the Act.
- 5. By disciplining the Employer's representatives referred to in paragraph 4 for performing struck work, including trying, fining, and/or expelling or suspending them, and/or causing System Council U-4 Death Benefit Fund, Inc., to terminate their coverage, Respondent Local Unions coerced and restrained the Employer in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances, and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b) (1) (B) of the Act.
- 6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

# ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

- A. The complaint be, an it hereby is, dismissed in so far as it alleges violations of the Act by International Brotherhood of Electrical Workers System Council U-4.
- B. Respondents International Brotherhood of Electrical Workers Local Union Nos. 641, 622, 759, 820, and 1263, their officers, agents, and representatives, shall:

#### 1. Cease and desist from:

- (a) Restraining or coercing Florida Power & Light Company, or any other employer, in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by trying or disciplining such representatives because they have performed struck work for their employer.
- (b) In any like or related manner restraining or coercing Florida Power & Light Company or any other employer in the selection of its representatives for the purposes of collective bargaining or adjusting grievances.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
- (a) Expunge all record of the disciplinary proceedings and actions taken against those individuals named in Appendix A to this Decision because they performed struck work during the 1969 strike against Florida Power & Light Company.
- (b) Rescind all fines levied, as detailed in Appendix A to this Decision, for performing struck work for Florida Power & Light Company during the 1969 strike and refund to those individuals any money paid to Respondents as a result of such fines.
- (c) Restore membership, and all consequent rights, to those individuals named in the applicable part of Appendix A to this Decision, who were unlawfully expelled or suspended.

- (d) Notify, in writing, System Control U-4 Death Benefit Fund, Inc., any other benefit plan affected by the discipline found unlawful herein, and those individuals listed in the applicable part of Appendix A to this Decision whose coverage the respective Respondents caused to be terminated, that they are in good standing and are eligible for coverage in the same manner as before Respondents' imposed such discipline.
- (e) Notify, in writing, those individuals listed in the applicable part of Appendix A to this Decision that all rights and benefits, including union membership, to which they were entitled before the disciplinary action, found to be unlawful herein, was taken against them, have been restored and that any fines have been rescinded and all applicable records expunged.
- (f) Post at their business offices and meeting halls copies of the attached notice marked "Appendix B, C, D, E, and F"<sup>2</sup> as appropriate. Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by the appropriate Union's representative, shall be posted by each Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by each Respondent Union

<sup>&</sup>lt;sup>2</sup>In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

to insure that said notices are not altered, defaced, or covered by any other material.

- (g) Mail to the Regional Director for Region 12 signed copies of said notices for posting by Florida Power & Light Company, if willing, in places where notices to employees are customarily posted. Copies of said notices, to be furnished by the Regional Director for Region 12, shall, after being duly signed by the respective Respondent Union's official representative, be forthwith returned to the Regional Director.
- (h) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. Sep 2 1971

Howard Jenkins, Jr., Member

Ralph E. Kennedy,

Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

My colleagues have found that the Respondent Local Unions here violated Section  $8(b)\,(1)\,(B)$  of the Act by coercing and restraining the Employer in the selection of its representatives for the purposes of collective bargaining

and adjusting grievances. I disagree and, for the reasons set forth in my dissenting opinion in Illinois Bell Telephone Company, 192 NLRB No. 17, would dismiss the complaint in its entirety.

Dated, Washington, D.C. Sep 2 1971

John H. Fanning,

Member

# NATIONAL LABOR RELATIONS BOARD

# APPENDIX A OF APPENDIX B

The parties have stipulated that the Respondent International Brotherhood of Electrical Workers Local Unions tried, and imposed discipline on, certain named individuals who were selected by the Employer for the purpose of acting as its representatives in matters concerning collective-bargaining interpretations and adjusting grievances, including causing them to lose their right to participate in System Council U-4 Death Benefit Fund, Inc. (except as noted by an asterisk), because they performed struck work for the Employer, as follows:

#### No. 641:

H. E. Weatherly*	fined	\$6,000	set	aside on appeal	
M. R. Weeks*	"	\$6,000	no	appeal	
C. E. Baker*	"	\$6,000	"	"	
Dan Bigelow*	"	\$6,000	,,	"	

# No. 820

R. T. Horne	fined \$6,000 reduced to \$5,500	no appeal
O. M. Brannon	fined \$500 reduced to \$100	"
F. D. Fishel	fined \$6,000 reduced to \$500	"
T. R. Brandewie	fined \$6,000	" " .
E. W. Jones	fined \$500 reduced to \$100	" "
C. A. Norris	fined \$500 reduced to \$100	"
C. A. Pearsall	fined \$500 reduced to \$100	" "
J. E. Bryan	fined \$500 reduced to \$100	appeal denied
H. D. Stephens	fined \$500	» »
No. 622:		
C. J. Rutledge	fined \$1,500 suspended for	reduced to \$100 and suspension set

No. 759:

Richard Ackerman fined \$1,000 no appeal expelled

3 years

aside on appeal

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Ernest Beasley, Jr.	fined \$1,000 expelled	"
Fred Davis	fined \$1,000	" "
Joseph L. Helmich	fined \$1,000 expelled	"
Frank Henderson	fined \$1,000 expelled	"
R. P. Norman	fined \$1,000 expelled	" "
S. V. Wanklyn	fined \$1,000 expelled	"
C. W. Bingham	fined \$1,000 expelled	no appeal
E. F. Borchardt	fined \$1,000 expelled	""
William Cole	fined \$1,000 expelled	" "
J. T. Hardy, Jr.	fined \$1,000 expelled	"
C. E. Stout, Jr.	fined \$1,000 expelled	" "
Frank Ludlow	fined \$1,000 expelled	" "
P. Den Bleyker	fined \$1,000 expelled	" "
Earl Guyaux	fined \$1,000 expelled	no appeal

T. D. Burkett	fined \$1,000 expelled	"
W. B. Hoffman	fined \$1,000 expelled	appeal denied
L. E. Jones	fined \$1,000 expelled	no appeal
R. W. LaRoche	fined \$1,000 expelled	appeal denied
L. H. Grubbs	fined \$1,000 expelled	no appeal
H. E. Hardee	fined \$1,000 expelled	29 29
Stanley Hutcheson	fined \$1,000 expelled	22 22
Charles Pogel	fined \$1,000 expelled	"
T. W. Norton	fined \$1,000 expelled	<b>))</b>
Claude Overfelt	fined \$1,000 expelled	"
R. O. Stamps	fined \$1,000 expelled	29 ·
J. E. McLeod	fined \$1,000 expelled	"
W. H. McNary	fined \$1,000 expelled	reduced to \$200 on appeal appeal denied

# App. 93

H. L. Orton	fined \$1,000 expelled	no appeal
Robert Rogers	fined \$1,000 expelled	" "
H. V. Johnson	fined \$1,000 expelled	no appeal
Emil Piazzo	fined \$1,000 expelled	27 29
Fred Shaver	fined \$1,000 expelled	"
W. M. Smith	fined \$1,000 expelled	" "
V. J. Nicholas	fined \$1,000 expelled	reduced to \$500 on appeal appeal denied— paid fine
P. T. McAllister	fined \$1,000 expelled	no appeal
W. L. Roper	fined \$1,000 expelled	reduced to \$400 on appeal appeal denied
A. D. Reed	fined \$1,000 expelled	reduced to \$200 on appeal appeal denied— paid fine
Everett Weeks	fined \$1,000 expelled	no appeal
No. 1263:		
William S. Doughty	expelled	no appeal

#### APPENDIX B OF APPENDIX B

#### NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT try, fine, or cause to lose their right to benefits to which they would otherwise be entitled, representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL notify any benefit plan to which their rights were affected by our disciplinary actions, and those individuals affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 641

(Labor Organization)

Dated By _		
	(Representative)	(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

# APPENDIX C OF APPENDIX B

# NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT try, fine, suspend from union membership, or cause to lose their right to benefits to which they would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL restore to membership, and all rights that that entitles them to, such representatives whom we have suspended from union membership.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected by our disciplinary actions, and those individuals affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 622

(Labor Organization)

Dated	Ву		
		(Representative)	(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

# APPENDIX D OF APPENDIX B

# NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT try, fine, expel from union membership, or cause to lose their right to benefits to which they would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or ad-

justing grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL restore to membership, and all rights that that entitles them to, such representatives whom we have expelled from union membership.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected by our disciplinary actions, and those individuals affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 759

(Labor Organization)

Dated	Ву		
		(Representative)	(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

#### APPENDIX E OF APPENDIX B

#### NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT try, fine, or cause to lose their right to benefits to which they would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL rescind all fines levied against such representatives because they performed struck work during the 1969 strike and refund to them any money they have paid us as a result of such fines.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

	OF ELECTRICAL WORKERS LOCAL UNION NO. 820	
		(Labor Organization)

(Representative)

INTERNATIONAL BROTHERHOOD

(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

# APPENDIX F OF APPENDIX B

# NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT try, expel from union membership, or cause to lose their right to benefits to which they would otherwise be entitled, including coverage by System Council U-4 Death Benefit Fund, Inc., representatives selected by Florida Power & Light Company, or any other employer, for the purpose of collective bargaining or adjusting grievances, because they performed struck work for their employer.

WE WILL NOT in any like or related manner coerce or restrain Florida Power & Light Company, or any other employer, in the selection of its representatives for the purpose of collective bargaining or adjusting grievances.

WE WILL expunge all record of the disciplinary proceedings and actions taken against Florida Power & Light Company's representatives for the purposes of collective bargaining or adjusting grievances because they performed struck work during the 1969 strike.

WE WILL restore to membership, and all rights that that entitled them to, such representatives whom we have expelled from Union membership.

WE WILL notify System Council U-4 Death Benefit Fund, Inc., any other benefit plan to which their rights were affected, that they are in good standing and are eligible for coverage in the same manner as before our disciplinary actions.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 1263

(Labor Organization)

Dated	By	•			
	-,	(Representative)	4	(Title)	

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 706, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, extension 227.

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#### APPENDIX C

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.).

# Section 2. When used in this Act -

- The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.
- (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8(b). It shall be an unfair labor practice for a labor organization or its agent —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

# APPENDIX D App. 105

# In the

# United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1972

SEPTEMBER SESSION, 1972

No. 71-1864

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

WISCONSIN ELECTRIC POWER COM-

Intervenor,

LOCAL 2150, INTERNATIONAL BROTH-ERHOOD OF ELECTRICAL WORKERS, AFL-CIO.

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

ARGUED NOVEMBER 29, 1972 - DECIDED JULY 13, 1973

Before Kiley and Cummings, Circuit Judges, and Eschbach, District Judge.

Cummines, Circuit Judge. The National Labor Relations Board found that the Union violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining certain company supervisors for performing bargaining unit

<sup>&</sup>lt;sup>2</sup> District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

<sup>2</sup> Local 2150, International Brotherhood of Electrical Workers, AFL-CIO.

work during the Union's economic strike. This case arises on the Board's application for enforcement of its order issued pursuant to that finding. The Board's decision and order are reported at 192 NLRB No. 16.

Since the 1930's the Company and the Union have enjoyed a collective bargaining relationship. When their then current two-year contract expired on June 16, 1969, the Union initiated an economic strike which continued until July 1, 1969. During the strike all the Company's supervisors in the categories of those disciplined save one, who was hospitalized at the time, reported for work. The record contains no suggestion that the Company gave the supervisors an option to choose not to cross the picket line. Following the strike the Union preferred charges against 60 supervisors (including the hospitalized one) for doing struck work. All but two of these were holders of union withdrawal cards. A withdrawal card entitles the holder to a very qualified union membership as explained below. After a trial at which none of the charged supervisors appeared, the Union found all guilty except for the hospitalized supervisor and one of the two who did not possess a withdrawal card. The other supervisor not retaining a withdrawal card had his discipline nullified upon appeal to the International Union. The Union imposed on each guilty supervisor a \$100 fine and a year's suspension. This sentence was to be suspended on condition that the supervisors were not found guilty of a similar

Although at oral argument before the Board company counsel asserted that the Company had instructed the supervisors to report for work and this is uncontroverted, as the Board noted, that is not explicit in the record. However, unless the Company expressly gave the supervisors an option as to whether to cross the picket lines or not, the Board's case would not be vulnerable. It is such an option which could present a problem in that if the Company left to the supervisors' discretion the decision whether to allign themselves with management or with the Union, arguably it might be difficult for the Company legitimately to complain about the Union's compromising the loyalty of these representatives. But see International Brotherhood of Electrical Workers v. National Labor Relations Board, ... F.2d ..., ..., (D.C. Cir. 1972) Slip Op. at 21. (It has aslo been suggested that whether the supervisors were performing a properly supervisory function might be more debatable. See id., ... F.2d at ..., Slip. Op. at 47.) But this record contains not the slightest hint of the Company's giving such an option and, even if there were no direct order, is only reasonably consistent with the Company's expectation that the supervisors would report for work.

The complaint originally involved 61 persons, but the 61st, a safety specialist, was found to be not clearly a statutory supervisor and not to be an employer representative within the coverage of Section 8(b) (1) (B).

offense for a period of two years, which period extended beyond the expiration of the new collective bargaining agreement.

None of the supervisors here involved were members of the bargaining unit, and the Union did not represent them in bargaining with the Company. Nevertheless, the collective bargaining agreement in force prior to the strike provided that upon an employee's promotion to a supervisory position the Union would give him a withdrawal card if he so requested. Union withdrawal cards are either of the honorary or participating type. Some supervisors involved here held the former; others the latter. Both types carry an exemption for the holder from the dues obligation to the Union and entitle the holder to regain regular membership without fulfilling normal reinstatement requirements. In addition, the holder of the participating withdrawal card is entitled to participate in the pension and insurance benefits of the Union's International Affiliate upon the payment of certain fees. Withdrawal card-holders are denied all other benefits of membership including even the right to attend union meetings, but are subject to the Union's constitution.

The Board agreed with the Trial Examiner that all 60 of the concededly statutory supervisors' possessed the authority to adjust grievances and were representatives of the Employer within the meaning of Section 8(b)(1)(B). The Union does not contest this finding. With Member Fanning dissenting, a three-member majority of the Board panel concluded that the Union violated Section 8(b)(1)(B) when it disciplined the supervisors for crossing the picket line and performing struck work. Relying on the general principles of law defining the thrust of Section 8(b)(1)(B) as enunciated in Lithographers Locals 15-P and 272 (The Tolcdo Blade Co., Inc.), 175 NLRB 1072, 1080, enforced, 437 F.2d 55 (6th Cir. 1971), which principles the Board found long settled in its decisions and the courts', the Board reasoned:

"Here the supervisors, by doing struck work, as directed, by the Employer, were furthering the inter-

<sup>\*</sup>See Secion 2(11) of the Act (29 U.S.C. § 152(11)) for the statutory definition of "supervisor."

ests of the Employer in a dispute not between the Union and the supervisor-union members but between the Employer and the Union. During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.

"Of course, our decision is not meant to imply that a union is completely precluded from disciplining supervisor-union members. It only means that when the underlying dispute is between the employer and the union rather than between the union and the supervisor, then the union is precluded in taking disciplinary action by Section S(b)(1)(B). The intent is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position easts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective-bargaining and grievance adjustment representative. The purpose of Section 8(b) (1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. Accordingly, we find that Section 8(b)(1)(B) has been violated."

Section S(b)(1)(B) of the Labor-Management Relations Act (29 U.S.C. § 158 (b)(1)(B)) provides: "It shall be an unfair labor practice for a labor organization or its agents \* \* to restrain or coerce \* \* an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The Union raises three principal arguments against the Board's decision that discipline of supervisor-members for performing struck work for the Employer was prohibited by this Section. First, the Union urges that the Section should be interpreted literally so as only to prohibit unions from "restraining or coercing employersnot supervisors-in the selection of representatives for bargaining or grievance adjustment process." Second, it argues that even if Section 8(b)(1)(B) does prohibit union restraint or coercion against employers through the imposition of discipline on supervisor-members (who are concededly representatives of the employer) for their exercise of management responsibilities, it does not reach

<sup>\*</sup>Thus the Board agreed with the Trial Examiner's decision as regards those supervisors whose disciplines remained in effect but, contrary to the Trial Examiner, concluded that as regards the two supervisors against whom charges were eventually dropped and the third whose discipline was revoked on appeal, the Union had also violated Section 8(b) (1) (B). It reasoned "[t]he fact that the Union brought charges of misconduct against these supervisors is sufficient to warrant the finding of a violation."

With regard to the Union's merely bringing charges against the one supervisor who did not possess a withdrawal card and in fining the other non-possessor of a withdrawal card, whose discipline was revoked on appeal, the restraint or coercion of the employer is not so clear. Since these supervisors had no cards, since the Union's actions against them were concededly the result of error, and since the Union professes no jurisdiction over them, it is difficult to see how the Company can reasonably be doubtful of their loyalty or how they might in fact be deterred from vigorously representing management's interests in their representative capacities. The situation may be different with respect to the hospitalized supervisor because he did retain a withdrawal card, and the Union's actions in preferring charges against him served notice on him that had he actually performed his managerial responsibility, the Union would surely have fined him. His loyalty and effectiveness in the future might be undermined. Nevertheless, the Union has not objected to the Board's treating the aborted discipline of any of these three supervisors on the same footing as the discipline of the others. Therefore, we do not actually reach the point, but do put the Board on notice that when the issue is live, the Board's conclusion as to restraint or coercion in similar circumstances will be closely scrutinized.

disciplinary action taken against these persons for their performance of struck work. Third, it contends that the Supreme Court's decision in National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, demonstrates that the Union's exertion of internal discipline against any members for crossing its picket lines is not restraint or coercion within the meaning of Section 8(b)(1)(B).

Each of these arguments was raised and rejected in International Brotherhood of Electrical Workers v. National Labor Relations Board, ........ F.2d ........ (D.C. Cir. 1972). In that case also, the union disciplined supervisors who performed rank-and-file work during an economic strike. We are persuaded by much of Judge MacKinnon's reasoning and consider it largely dispositive of the arguments the Union makes on the facts of this case. Although we shall not traverse in detail the same ground he has so thoroughly covered, because the panel in the District of Columbia Circuit was so sharply divided, we shall briefly respond to the Union's arguments and address what we believe to be the critical points of difference between the majority there and Judge Wright in dissent.

This opinion was prepared before the release of the District of Columbia's en bane opinion in International Brotherhood of Electrical Workers v. National Labor Relations Board, ... F.2d ... decided June 29, 1973. In its en bane opinion the District of Columbia Circuit also disposed of National Labor Relations Board v. Florida Power & Light Co., wherein some of the supervisors disciplined for performing struck work were not included in the bargaining unit, were not represented by the union in bargaining, were only stilliated with the union by virtue of withdrawal cards, and were not shown to have been accorded an express option by the employer as to working during the strike. At the very least, insofar as it reaches an opposite conclusion on these facts, we disagree with the majority opinion therein and are in accord with Judge MacKinnon's dissenting opinion representing the views of himself and Judges Tamm, Robb, and Wilkey. The references herein to the International Brotherhood of Electrical Workers opinion refer to the prior panel opinion, ... F.2d ... (D.C. Cir. 1972).

<sup>\*</sup>The facts in International Brotherhood of Electrical Workers v. National Labor Relations Board, supra, are different in several respects from those in this case, and, of course, we intimate no view as to whether the differences call for a different result. In that case, the disciplined supervisors were full union members, were required to be union members under the terms of the union security provision of the collective bargaining agreement, and were members of the bargaining unit. Also, at the inception of the strike, the company expressly told the supervisors that the decision whether or not to respect the picket lines was up to the discretion of each individual foreman.

The Union's literal interpretation argument was squarely rejected by the Board in San Francisco-Oakland Mailers. No. 18, 172 NLRB 2173 (1968). In that case the union brought charges against certain supervisor-members for alleged contract violations including the use of an assistant foreman to repair a machine and the permiting of non-union members to do bargaining unit work, and the union fined the supervisors for contempt when they failed to appear before the executive committee. In finding a violation of Section S(b)(1)(B), the Board stated:

" • Respondent's actions • • were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section S(b)(1)(B) Congress sought to prevent the very evil involved herein-union interference with an employer's control over its own representatives. [Footnote omitted.] That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them." 172 NLRB at 2173.

Without exception the courts which have been faced with the question have interpreted Section S(b)(1)(B) not merely to prohibit restraint or coercion directly aimed at an employer in his actual selection of his representatives but to forbid pressure against an employer accomplished indirectly by way of disciplinary action leveled against those whom the employer had selected to represent him for their conduct in performing their collective bargaining or grievance-adjustment functions, which included contract interpretation. We agree that an em-

<sup>\*</sup> Dallas Mailers Local 143 v. National Labor Relations Board, 445 F.2d 730 (D.C. Cir. 1971); National Labor Relations Board v. Lithographers Local Nos. 15-P and 272, 437 F.2d 55 (6th Cir. 1971); National Labor Relations Board v. Sheet Metal Workers Local 49, 430 F.2d 1348 (10th Cir. 1970).

ployer's right to select those representatives whom he chooses would be worthless if the Union could accomplish the functional equivalent of restraining or coercing him in that selection by applying pressure upon those whom the employer has already selected so as to compromise their loyalty. But, like the District of Columbia Circuit, we do not believe Section 8(b)(1)(B) can properly be confined to apply only to union discipline of an employer representative that is based upon his actions on behalf of management regarding a specific disagreement with the Union over the negotiation of a contract term or the proper interpretation of the collective bargaining agreement or the adjustment of a specific grievance. International Brotherhood of Electrical Workers v. National Labor Relations Board, supra, ....... F.2d at ......., Slip. Op. at 14.10

Because they are supervisors, an employer has a right to expect that whether they are union members or not, they will discharge their properly supervisory or managerial responsibilities in the best interests of the company. When the employer has a dispute with the union, and the union disciplines supervisors for performing their supervisory responsibilities on the employer's behalf in that dispute, that discipline "drive[s] a wedge between [the] supervisor[s] and the Employer" and may reasonably be expected to undermine the loyalty and effectiveness of these supervisors when called upon to act for the company in their representative capacities." In this way

<sup>&</sup>lt;sup>20</sup>See Meat Cutters Local 81 v. National Labor Relations Board, 458 F.2d 794 (D.C. Cir. 1972) (discipline of supervisor-grievance adjustment representative for carrying out management's order to implement new Mexico Dist. Coun. of Carpenters, 454 F.2d 1116 (10th Cir. 1972) (discipline of supervisor-representative for working for an employer who was not making payments into the union's health and welfare fund and who had no working agreement with the union; discipline of supervisor-grievance adjustment representative for co-signing letter urging employees to vote against the union in an upcoming election).

In As the Sixth Circuit stated in a case where supervisors were fined for performing struck work in alleged derogation of the collective bargaining agreement, "[t]his conduct of the union would further-operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired." National Labor Relations Board v. Lithographers Locals Nos. 15-P and 272, 437 F2d 55, 57 (6th Cir. 1971). And in Meat Cutters Local 81 v. National Labor Relations Board, 458 F2d 794, 799

the union's discipline effects a "substitution of attitudes rather than of persons" and accomplishes the functional equivalent of forcing the employer to select representatives responsive to the union's interests.

We cannot accept the notion that supervisors who perform bargaining-unit work during a strike, at least in the absence of an express option to refuse to cross the picket line, are not exercising a properly supervisory responsibility because "under normal circumstances" that work is the responsibility of rank-and-file employees. Id .. ...... F.2d at ......, Slip. Op. at 45. What a supervisor's proper functions are when the full complement of emplovees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike. Otherwise. with no employees to supervise, many supervisors would simply have no managerial responsibilities during a strike. But it can hardly be doubted that it is an essential part of the economic warfare involved in a strike for management to muster its resources in an effort to withstand the union's economic coercion. Equally undisputable, it would seem, is that an employer is not limited to com-

<sup>11 (</sup>Continued)

<sup>(</sup>D.C. Cir. 1972), where the union disciplined a supervisor for implementing the employer's new meat procurement policy, the Court stated, "\* \* there would have been serious doubt thereafter as to whether he could represent the Company in a bona fide manner against the Union in other matters where their interests were adverse."

batting a strike only with his pocketbook while the business lies idle. Rather, management has "traditionally" (id.) relied upon supervisors, where practicable, to pitch in and perform rank-and-file work in an attempt both to strengthen its bargaining position and to preserve the enterprise from collapse during and adverse economic repercussion following a strike. Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. Indeed, in a real sense they are representing the employer for the purpose of collective bargaining, for "the use of economic pressure by the parties to a labor dispute ... is part and parcel of the process of collective bargaining." National Labor Relations Board v. Insurance Agents International Union, 361 U.S. 477, 495. Insofar as their effort helps to keep the business going in order to fulfill commitments to customers and to preserve the company's clientele and good name from deterioration, it lies at the very core of the entrepreneurial function. Assuredly here where the Company is an electric power company, holding a monopoly, its managment has an especial obligation to continue to provide an indispensable public service during a time of strike. Accordingly, we think supervisors who act in their employer's interests by performing rank-and-file work during a strike are indeed performing a properly managerial function.

v. Allis-Chalmers Mfg. Co., 388 U.S. 175, has controlling significance for this case because the words "restrain or coerce" are common to Sections 8(b)(1)(A) and 8(b) (1)(B) and because in both cases the Unions imposed fines for the performance of struck work (International Brotherhood of Electrical Workers v. National Labor Relations Board, supra, ....... F.2d at ......., Slip Op. at 49-54) must be rejected. Allis-Chalmers only considered the question whether union fines against employee-members for strikebreaking constituted an unfair labor practice under Section 8(b)(1)(A) as a restraint or coercion of those employees in the exercise of their Section 7 right

to refrain from concerted activities.12 Id. at 176. Here the question is whether the imposition of discipline against supervisor-members for performing struck work is an unfair labor practice under Section 8(b)(1)(B) as a restraint or coercion of the employer in his right to select and retain loyal representatives. Since Sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests, it simply does not follow that discipline which does not amount to restraint or coercion of the employee under the former cannot constitute restraint or coercion of the employer under the latter. The analysis of the employeemember's relationship with his union on which Allis-Chalmers is predicated is not apposite or adequate when the employer claims that the union's discipline of its members interfered with his protected relationship with his representatives.

In Allis-Chalmers the Supreme Court concluded that Congress did not intend in enacting Section 8(b)(1)(A) to regulate internal union affairs to the extent of stripping unions of the power to fine members for strikebreaking (Id. at 183), but that says nothing about the proper reach of Section 8(b)(1)(B), by which Congress evidenced a concern to deprive the unions of power to turn the employer's representatives against him. Recently the Supreme Court has explained that the basis of its holding in Allis-Chalmers was that Section 8(b)(1)(A) was "not intended by Congress to apply to the imposition of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act." National Labor Relations Board v. The Boeing Co., ...... U.S. ....., 41 U.S.L.W. 4678, 4679. Where, as here, Congress granted express protection to the employer-representative relationship it cannot be said that Congress intended to leave

<sup>12</sup> Section 8(b) (1) (A) (29 U.S.C. § 158(b) (1) (A)) provides:

"It shall be an unfair labor practice for a labor organization or its agents • • to restrain or coerce • employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein • • • "

Section 7 (29 U.S.C. § 157) provides in pertinent part:

"Employees shall have the right to • • engage in • • • concerted activities • •, and shall also have the right to refrain from any or all of such activities • • "

the union as free to discipline its members as it did in enacting Section S(b)(1)(A).

Accordingly, Allis-Chalmers does not control this case. To be sure the Union's interest in enforcing a rule against its members crossing picket lines must be acknowledged, but in our view its enforcement against supervisor-members who are employer representatives "impairs [a] policy Congress has imbedded in the labor laws." National Labor Relations Board v. Textile Workers, 409 U.S. 213, 216; Scofield v. National Labor Relations Board, 394 U.S. 423, 430.

The Union also argues that since the Company allowed its supervisors to retain union membership, it thus voluntarily agreed that the Union could exert its discipline over these members. Undoubtedly by permitting employees promoted to supervisory positions to retain withdrawal cards, the Company must be taken to have acquiesced in some union control over those supervisors who requested the cards. But to agree that the Company acceded to some union control hardly means that the Company waived its right to the protection of Section 8(b)(1)(B). Even where employers have agreed to union security provisions requiring supervisors to be full union members, and they were included in the bargaining unit, no waiver of the protection of Section 8(b)(1)(B) has been found. International Brotherhood of Electrical Workers v. Na-tional Labor Relations Board, supra, ...... F.2d at ...... Slip Op. at 15-16; Lithographers Locals 15-P and 272 (The Toledo Blade Co., Inc.), 175 NLRB 1072, 1080, enforced, 437 F.2d 55 (6th Cir. 1971); see Meat Cutters Local 81 v. National Labor Relations Board, 458 F.2d 794, 796 n. 3 (D.C. Cir. 1972). Whether or not that view is correct, surely no waiver should be found here where the supervisors were not in the bargaining unit and retained only a vestigial membership status entitling them to nothing more than a waiver of reinstatement requirements and, in the case of the participating with drawal card-holder, certain pension and insurance benefits. Indeed, the logical upshot of the Union's argument is that the Company acquiesced in any discipline the Union might impose on a supervisor for practically anything since the Union's constitution, to which the withdrawal card-holders are subject, makes it an offense to work "in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W." Furthermore, the withdrawal card, and in turn the Company's agreement that promoted supervisors could request and retain the cards, hardly clear by their own terms, must be construed as ambulatory with respect to changes in the Union's constitution. If the Company waived the protection to which it is entitled under Section S(b)(1)(B), that waiver must be found in clear and unmistakable terms. See National Labor Relations Board v. Wisconsin Aluminum Foundry Co., 440 F.2d 393, 399-400 (7th Cir. 1971). Since we cannot find such an expression of waiver, the measure of union control over supervisor-members in which the Company acquiesced is only that which is without the reach of Section 8(b)(1)(B).

Accordingly, the Board's order will be enforced.

KILEY, Circuit Judge, dissenting.

I respectfully dissent, for the reasons so ably and persuasively expressed by Judge Skelly Wright in writing the opinion for the District of Columbia Circuit On Rehearing En Banc in International Brotherhood of Electrical Workers, etc., et al. v. National Labor Relations Board, Nos. 71-1558 and 71-1712, decided June 29, 1973.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

<sup>13</sup> International Brotherhood of Electrical Workers Constitution, Article XXVII, Section 1.(10).

USCA 4013-The Scheffer Press, Inc., Chicago, Illinois-7-13-73-200



### APPENDIX E App. 119

# United States Court of Appeals For the Ninth Chrouit

NATIONAL LABOR RELATIONS BOARD,

Petitioner.

VS.

SAN FRANCISCO TYPOGRAPHICAL UNION No. 21, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO. Nos. 71-2949 and 71-2987

Respondent.

### [May 18, 1973]

On Application for Enforcement of an Order of the National Labor Relations Board

Before: MERRILL and ELY, Circuit Judges, and SOLOMON,
District Judge.

SOLOMON, District Judge:

The National Labor Relations Board (the Board) seeks to enforce its orders directing the Typographical Union to rescind the disciplinary actions the Union took against four members who were supervisory employees of the San Rafael Independent Journal (Journal). The Board contends that the Union may not punish these men for violating Union rules and policy, even though they crossed and worked behind the Union's picket lines.

Gordon Dixon was the mechanical superintendent and the foreman of the composing room. On October 10, 1969, Dixon, exercising his authority as foreman, discharged Paul Austin because Austin took an afternoon off without permission. The Union voted to require Dixon to reinstate Austin, but Dixon refused. The President of the Union filed charges against Dixon, and, after a hearing, Dixon was fined \$418.00.

<sup>\*</sup>Honorable Gus J. Solomon, United States District Judge, Portland, Oregon, sitting by designation.

The Board determined that the Union's action was an unfair labor practice, and it ordered the Union to rescind the fine and expunge Dixon's record.

Later, the Union disciplined Robert Dixon, Earl Dixon and Ernest Fingerlos because they crossed the Union's picket line. On January 7, 1970, the Union struck the Journal after a breakdown in contract negotiations. Robert and Earl Dixon, both assistant foremen in the composing room, ignored the picket line and continued to work. The Union expelled and fined them each \$10,000.00 for strikebreaking.

Ernest Fingerlos was the chief machinist. Fingerlos first joined the strike but returned to his job about three months later while the strike was still in progress. The Union expelled Fingerles and fined him \$10,000.00.

Gordon Dixon also crossed the picket line and was charged with strikebreaking. The Union had tried him, but at the time of the Board's hearing, the results were not known to the trial examiner.

The Board found that the Union illegally punished the strikebreakers and ordered the Union to reseind the fines, reinstate the men, and expunge their records.

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, defines unfair labor practices. It provides, in part, that:

- (b) It shall be an unfair labor practice for a labor organization or its agents—
  - (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

The Board acknowledges that Section 8(b)(1)(A) does not prevent a union from imposing reasonable fines on members who cross a picket line, or from expelling them. NLRB v. Allis-

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The Board acknowledges that Section 8(b)(1)(A) does not prevent a union from imposing reasonable fines on members who cross a picket line, or from expelling them. NLIB v. Allis-

Chalmers Mfg. Co., 3SS U.S. 175 (1967). But the Board contends that here the Union violated Section S(b)(1)(B) because the members were supervisors.

The Union contends that it can discipline a supervisor for the same reasons it can discipline any other member.

The Union fined Gordon Dixon because he discharged an employee. Dixon acted in his capacity as a foreman empowered by the Journal to punish employees who violate company rules. By fining Dixon, the Union interfered with Dixon's position as a supervisor and committed an unfair labor practice under Section 8(b) (1) (B). NLRB v. Tolcdo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers Int'l. Union, 437 F.2d 55 (6th Cir. 1971).

The Union's punishment of the strikebreakers presents a different issue. Although Robert and Earl Dixon and Ernest Fingerlos were supervisors, the Union did not punish them for excreising any management duty.

These three men refused to honor the picket line of their Union, and there is no reason to treat them differently than non-supervisors. The Journal's right to select management representatives under Section 8(b)(1)(B) is not affected by the Union's action.

In Allis-Chalmers, the Supreme Court said that "[t]he economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement on its own terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . '" Id. at 181. Here, the Board's broad interpretation of Section 8(b)(1)(B) threatens that power. It is an unjustifiable extension of the limited language of Section 8(b)(1)(B). Had the members elected to resign from the Union, the power of the Union over them would have ended. NLRB v. Granite State Joint Board, etc., 41 U.S.L.W. 4074 (U.S. Dec. 7, 1972). But here the members remained in the Union, and therefore continued to be subject to their obligations as members.

The Board has not passed on whether the \$10,000 fines are unreasonable, and therefore illegal, under Allis-Chalmers. We

express no opinion on that issue. The Board must make that determination in the first instance. Morton Salt Co. v. NLRB, No. 71-1853 (9th Cir., Dec. 8, 1972), petition for cert. filed, March 6, 1973, No. 72-1210.

The issue of whether the expelled members lose their Union benefits is not properly before us, and we express no opinion on that issue.

We grant enforcement of the Board order rescinding the \$418.50 fine against Gordon Dixon, and we remand to the Board for further proceedings relative to the \$10,000.00 fines. Otherwise, enforcement is denied.

# APPENDIX F

App. 123

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

### United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

### No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 131, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

### No. 71-1785

BELL SUPERVISORS PROTECTIVE ASSOCIATION (NOT A LABOR ORGANIZATION), PETITIONER

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitions for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

Decided September 22, 1972.

Mr. Laurence J. Cohen and Mr. Robert E. Fitzgerald, Jr., of the bar of the Supreme Court of Illinois, pro hac vice, by special leave of court, for petitioners in No. 71-1559.

Mr. George B. Christensen for petitioner in No. 71-1785.

Mr. Daniel M. Katz, Attorney, National Labor Relations Board, with whom Messrs. Marcel Mollet-Provost, Assistant General Counsel, and Warren M. Davison, Deputy Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before Wright and MacKinnon, Circuit Judges, and Matthews, U.S. Senior District Judge for the District of Columbia.

Opinion filed by MACKINNON, Circuit Judge.

Opinion filed by WRIGHT, Circuit Judge, concurring in part and dissenting in part, at p. 36.

Mackinnon, Circuit Judge: Illinois Bell Telephone Company (hereinafter referred to as the Company or the Employer) and its predecessors have maintained a contractual relationship with Local 134, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as Local 134) since 1909. Local 134 represents the Company's Chicago workers in the "Plant Department," including not only journeymen and apprentices employed as P.B.X. installers but also persons employed as "P.B.X. Installation Foremen," "Building Cable Foremen," and "General Foremen." Under Article III, Sec-

<sup>\*</sup> Sitting by designation pursuant to 28 U.S.C. § 294(c) (1970).

<sup>&</sup>quot;P.B.X." is the abbreviation for "private branch exchange," the telephone apparatus installed and maintained by the Company on the private premises of a customer.

This arrangement whereby foremen and rank-and-file

tion 1 of the collective bargaining agreement between Local 134 and the Company, which was in effect at all times relevant to the instant case, all members of the bargaining unit, including the above-mentioned foremen, were required to become and remain members of Local 134 within thirty days of the commencement of their employment.<sup>3</sup>

Between May 8, 1968, and September 20, 1968, Local 134 engaged in an economic strike against the Company. At the inception of this strike, the Company informed the foremen that it would like to have them come to work during the work stoppage, but it told them that the decision whether to work or to respect the strike was a matter left to the personal discretion of each individual foreman. The Employer indicated that those who chose not to work would not be penalized. On the other hand, a Local 134 representative warned the foremen, at a union meeting held immediately before the strike, that they would be subject to union discipline if they performed rank-and-file work during the strike. In response to this warning, several foremen formed the Bell Supervisors Protective Association (hereinafter referred to as the Association), and

employees have been included in the same bargaining unit was voluntarily consented to by the Employer.

Although collective bargaining agreements between the parties had at one time prescribed the monthly wage rates applicable to foremen, recent contracts have not contained such wage provisions. However, the agreement relevant here included a section entitled "Working Conditions for General Foremen and Foremen," which concerned payment for overtime work and for certain absences. Furthermore, when the Company recently revised the overtime schedule pertaining to foremen, it requested the concurrence of Local 134.

<sup>&</sup>quot;Rank-and-file work" concerns that work which is ordinarily performed by regular, non-supervisory employees in the bargaining unit.

through it they retained counsel to protect the rights of those foremen who chose to work during the strike. The Association also planned to encourage other Company foremen to report to work during the work stoppage.

During the course of the strike, some of the foremen reported to work and performed rank-and-file work, while other foremen chose to honor the strike and stayed away from work. After the strike, the Company in no way discriminated against the latter group, and it indeed promoted some of them to higher positions. Local 134, however, carried out its pre-strike warning and conducted disciplinary proceedings against a number of foremen.5 Local 134 imposed fines of \$500 on each foreman who performed rank-and-file work during the strike, and it imposed fines of \$1,000 each on the five foremen who were instrumental in the formation of the Association. Most of the foremen who were fined exercised their right under the constitution of the International Brotherhood of Electrical Workers, APL-CIO (hereinafter referred to as the International Union) to appeal from the disciplinary action of Local 134-first to the International Union Vice President, and then to the International Union President. The appellants contended that Local 134's imposition of fines upon them was illegal, and they asserted that the contractual union-security provision which required them to be members of Local 134 was similarly unlawful. Ofthose foremen who appealed, three had their appeals sustained on the ground that the charges against them had not been timely filed. Three others had their appeals disqualified based upon the procedural ground that their appeals were untimely. The other appellants had their disciplinary fines upheld. Local 134 has commenced suit in

<sup>&</sup>lt;sup>6</sup> Pursuant to the union-shop provision in the applicable collective bargaining agreement, these foremen were all full members of Local 134.

the Illinois courts to collect some of the fines. Insofar as any of the foremen have paid any part of the fines, the Company has reimbursed them.

In June of 1969, the Association filed an unfair labor practice charge with the National Labor Relations Board (Labor Board or N.L.R.B.), alleging that Local 134 and the International Union had violated section S(b)(1)(B) of the National Labor Relations Act, as amended (N.L.R.A.),6 by fining the Company foremen because of their performance of rank-and-file work during the 1968 strike and by fining the five foremen who were instrumental in the formation of the Association. A complaint was issued pursuant to this charge, and a hearing relating thereto was held before Trial Examiner Frederick Reel. The first three days of hearings were devoted exclusively to the section 8(b)(1)(B) issue. However, on the afternoon of the fourth and final day of hearings, as the hearings were about to be closed, counsel for the Association offered a motion to amend the complaint "to Conform Pleading [i.e., the complaint] to Proof." The Association indicated that the collective bargaining agreement which contained the union-security provision had been admitted into evidence as part of the section 8(b)(1)(B) case, and it argued that this provision was in clear violation of section 8(a)(3)(i) of the N.L.R.A., since it covered a bargaining unit which included both "employees" and "supervisors." T

(2) by discrimination in regard to hire or tenure of

<sup>\*29</sup> U.S.C. § 158(b) (1) (B) (1970) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce \* \* \* (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

<sup>1.29</sup> U.S.C. § 158(a) (3) (1970) provides in relevant part:

(a) It shall be an unfair labor practice for an employer—

The counsel for the General Counsel of the Labor Board did not join in or consent to the Association's motion to amend the complaint. The Trial Examiner noted

employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made; \* \* \*

Since the bargaining unit included supervisors [see note 12 and accompanying text and note 24, infra.] with regular rank-and-file employees, the Association contended that the unit covered by the Company-Local 134 union-shop provision was not "appropriate" within the meaning of section 8(a) (3) (i). However, due to the fact that Local 134 was the only one of the two contracting parties before the Trial Examiner, the Association did not allege a violation of section 8(a) (3) (i), which only applies to employers, but it instead asserted the presence of a section 8(b) (2) violation. 29 U.S.C. § 158(b) (2) (1970) provides, inter clia: "It shall be an unfair labor practice for a labor organization or its agents—

\* \* (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section [i.e., section 8(a) (3)] \* \* \*"

\*It is important to note that the precise issue concerning the legality of the union-security provision under section 8 (a) (3) (i) of the N.L.R.A. had been previously raised by the Association, in 1968, at which time the General Counsel of the Labor Board refused to issue a complaint relating to the Association's unfair labor practice charge. Case 13-CA-8451. At that time, the General Counsel concluded:

The inclusion of alleged supervisors in the unit by vol-

that the identical legal contention presented by the Association had previously been rejected by the General Counsel, and he decided that it would not be appropriate to permit such an amendment under the circumstances of the case before him. He noted that "the amendment offered by the [Association] would of necessity add factual allegations to the complaint as well as new [N.L.R.A.] subsections to the list of those violated." 10 The Trial Examiner pointed out that the Association was seeking the invalidation of a contractual provision which had been in existence for many years, and he emphasized the fact that cases which had been recently before the Labor Board itself had involved such union-shop arrangements without evoking any intimation that the Board found anything irregular in them. In finally concluding that it would be "inadvisable" to permit the Association's amendment, the Trial Examiner said that he doubted "the wisdom of deciding so far reaching a question which enters this litigation only by the back door, as it were." 11 The N.L.R.B. sustained this determination.

The Labor Board concluded, in agreement with the Trial Examiner, that the Company foremen in question were "supervisors" within the meaning of section 2(11) of

untary agreement of the contracting parties did not, standing alone, constitute an unfair labor practice, nor did it render such unit inappropriate for coverage by an otherwise valid union security clause. See Nassau & Suffolk Contractors Ass'n., 118 NLRB 174, 177-184;

See note 8, supra.

<sup>10</sup> International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, I.B.E.W., 192 NLRB No. 17, T.X.D. slip op. at 13, 1971 CCH NLRB ¶ 23,282 (1971).

the Act,12 at all times relevant to the case. It also affirmed the determination that such foremen were "Employer representatives" within the meaning of section 8(b)(1) (B) of the Act.13 The Labor Board finally concurred in the Trial Examiner's conclusion that both unions-Local 134 and the International Union "-had restrained and coerced the Company in the selection of its collective bargaining and grievance adjustment representatives, in violation of section S(b)(1)(B), by disciplining foremen/ members for performing rank-and-file work during the 1968 strike and by fining foremen/members because of their action in forming the Association. A cease and desist order was issued, and the two unions were affirmatively ordered to rescind, and expunge all records of the fines imposed upon the foremen in violation of section 8(b)(1)(B) of the N.L.R.A.; to reimburse the foremen for any portions of their fines already paid; to advise each such foreman in writing that the fines have been rescinded and that the records pertaining thereto have been expunged; and to post appropriate notices.

The two unions and the Association petitioned this

<sup>&</sup>lt;sup>12</sup> 29 U.S.C. § 152(11) (1970). See N.L.R.B. v. Henry Colder Co., 416 F.2d 759, 754 n.3 (7th Cir. 1969), and cases cited therein.

ion have not challenged, on appeal, the Labor Board's findings that the foremen were "supervisors" and "Employer representatives," within the meaning of the N.L.R.A.

If The Labor Board found the International Union in violation of section 8(b) (1) (B), due to its affirmance, on appeal, of Local 134's imposition of disciplinary fines against the foremen. However, the Board's remedial order only provided for secondary liability on the part of the International Union with respect to the reimbursement of already collected fines and the providing of individual written notices for the disciplined foremen.

court for review of the Labor Board's decision, and the N.L.R.B. filed a cross-application for enforcement of its order. We affirm the decision of the Labor Board insofar as it pertains to the section 8(b)(1)(B) determination and the denial of the Association's request to amend the complaint. However, while enforcement of the Board's remedial order against Local 134 is granted in full, we believe that the remedial order against the International Union must be modified to reflect its proper measure of unfair labor practice responsibility.

Ι

Section 8(b)(1)(B) of the N.L.R.A. prohibits union coercion or restraint of an employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." <sup>15</sup> This provision, of course, clearly proscribes direct union interference with an employer's selection of his section 8(b)(1)(B) representatives. <sup>16</sup> However, as the Labor Board and several courts, including this one, have recently recognized, it also has much broader application. It prohibits indirect union restraint or coercion of an employer, accomplished through the imposition of discipline upon the employer's representatives for actions performed by them within the general scope of their supervisory or managerial responsibilities. Although the unions involved in the instant case have challenged this latter interpretation of section 8(b)

<sup>18</sup> See note 6, supra.

<sup>&</sup>lt;sup>16</sup> Sec Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B., —— U.S.App.D.C. ——, ——, 458 F.2d 794, 798 (1972); N.L.R.B. v. Local 294, International Brotherhood of Teamsters, 284 F.2d 893 (2nd Cir. 1960); Los Angeles Cloak Joint Board, 127 NLRB 1543, 1550-1551 (1960); International Union of Operating Engineers, Local 825, 145 NLRB 952, 962 (1964).

(1)(B) as being an unwarranted extension of the express language of the statutory provision, we must reject this assertion as contrary to the legislative intent of Congress.

### A. OAKLAND MAILERS AND ITS PROGENY

In San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB No. 252, 1963-2 CCH NLRB § 20,195 (1968), the N.L.R.B. held illegal union actions which "were designed to change the [employer's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will." In reaching the conclusion that the union's imposition of discipline on supervisors because of the manner in which they interpreted and applied the collective bargaining agreement violated section S(b)(1)(B), the labor Board noted:

In enacting Section 8(b)(1)(P) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [employer] by indirect rather than direct means, cannot after the ultimate fact that pressure was exerted here for the purpose of interfering with the [employer's] control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them.<sup>18</sup>

More recent Labor Board and court decisions have further applied the doctrine enunciated in Oakland Mailers.

ii 172 NLRB No. 252, slip op. at 2, 1968-2 CCH NLRB § 20,195.

<sup>18 172</sup> NLRB No. 252, slip op. at 2-3, 1968-2 CCH NLRB ¶ 20,195 (emphasis supplied). See New Mexico District Council of Corpenters and Joiners of America, 176 NLRB No. 105, slip op. at 4-5, 1969 CCH NLRB ¶ 20,951 (1969), enfd.,—F.2d—, 67 L.C. ¶ 12,403 (10th Cir. 1972).

In N.L.R.B. v. Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union, 437 F.2d 55 (6th Cir. 1971), wherein the court upheld the Labor Board's finding of a section S(b)(1)(B) violation, the Sixth Circuit stated:

This conduct of the union could very well be considered as an endeavor to apply pressure on the supervisory employees of the [employer], and to interfere with the performance of the duties which the employer required them to perform " " and to influence them to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union would further operate to make the [supervisory] employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired.

437 F.2d at 57 (emphasis supplied). See New Mexico District Council of Carpenters and Joiners of America, 177 NLRB 500, 502 (1969), enfd., — F.2d —, 67 L.C. ¶ 12,403 (10th Cir. 1972); N.L.R.B. v. Sheet Metal Workers, Local 49, 430 F.2d 1348, 1349-1350 (10th Cir. 1970); Local Union No. 2150, International Brotherhood of Electrical Workers, 192 NLRB No. 16, slip op. at 5-6 and cases cited n.5, 1971 CCII NLRB ¶ 23,280 (1971).

This court has also recognized the fact that the imposition of fines upon supervisory employees may coerce or restrain their employer in the effective selection of his representatives within the meaning of section S(b)(1)(B). See Dallas Mailers Union, Local 143 v. N.L.R.B., 144 U.S. App.D.C. 254, 259, 445 F.2d 730, 735 (1971). Although we did not expressly evaluate the propriety of the legal rationale underlying the Oakland Mailers' line of cases in our Dallas Mailers opinion, we implicity recognized its correctness. However, in our subsequent Meat Cutters opinion, we gave our express approval to the decisions

<sup>&</sup>quot; Meat Cutters Union Local 81 of the Amalgamated Meat

which had interpreted section 8(b)(1)(B) as prohibiting union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties.<sup>20</sup> Our conclusion was based upon the intention of Congress as expressed in the legislative history surrounding the enactment of section S(b)(1)(B) in 1947.

The Supreme Court has recognized the fact "that labor legislation is peculiarly the product of legislative compromise of strongly held views, Local 1976, Carpenters' Union v. Labor Board, 357 U.S. 93, 99-100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace for not embrace] conduct called in question. National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 619-620." 21 When Congress was considering amendments to the National Labor Relations Act in 1947, it was acutely aware of the fact that unions had previously "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union," and through the enactment of section 8(b) (1)(B) it endeavored "to prescribe a remedy in order to prevent such interferences." 22 Although this fact is highly pertinent to our evaluation of the proper scope of section

Cutters and Butcher Workmen of North America v. N.L.R.B.,

U.S.App.D.C. —, 458 F.2d 794 (1972).

<sup>&</sup>lt;sup>20</sup> Id., — U.S.App.D.C. at —, 458 F.2d at 798-799.

<sup>&</sup>lt;sup>21</sup> N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179 (1967).

<sup>&</sup>lt;sup>22</sup> II Legislative History of the Labor Management Relations Act, 1947 (N.L.R.B. 1948) [hereafter "Legislative History"] at 1077 (comments of Senator Ellender). See S. Rer. No. 105, 80th Cong., 1st Sess. 21 (1947), in 1 Legislative History at 427; II Legislative History at 1524 (comments of Senator Ball).

8(b)(1)(B), other legislative history surrounding the 1947 amendments must also be considered.

Section 8(b)(1)(B) must not be examined in a vacuum. It must instead be interpreted in conjunction with the other 1947 amendments to the N.L.R.A. relating to supervisory personnel.<sup>23</sup> The fact that Congress decided to expressly exclude "supervisors" from the statutory definition of "employee" in section 2(3)<sup>24</sup> is highly informative.

Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations. See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); L.A. Young Spring & Wire Corp. v. National Labor Relations Board, 1947, 82 U.S. App.D.C. 327, 163 F.2d 905, certiorari denied 1948, 333 U.S. 837

In Meat Cutters, we considered this prior analysis of the 1947 legislative history and concluded that "[a] supervisor's obligations to his union simply cannot detract

<sup>&</sup>lt;sup>23</sup> See sections 2(3), 2(11), and 14(a), 29 U.S.C. §§ 152 (3), 152(11), and 164(a) (1970).

<sup>24 29</sup> U.S.C. § 152(3) (1970) provides, inter alia: "The term 'employee' shall include any employee \* \* \* but shall not include \* \* any individual employed as a supervisor \* \* \* " See section 2(11) of the Act, 29 U.S.C. § 152(11) (1970), for the statutory definition of "supervisor."

<sup>&</sup>lt;sup>25</sup> Carpenters District Council of Milwaukee v. N.L.R.B., 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959) (emphasis supplied). See II Legislative History at 1524 (comments of Senator Ball).

from the absolute duty, evidenced by section S(b)(1)(B), which he owes to his employer when exercising his managerial authority." <sup>28</sup>

To ensure the accomplishment of the clear intention of Congress when it enacted section 8(b)(1)(B), that provision must not be interpreted in a hyper-technical manner. To construe that section as only applying to union discipline of a supervisor based upon his actions on behalf of management regarding a specific disagreement with the union over the proper interpretation of the collective bargaining agreement or the adjustment of a particular grievance, would defeat the reasons underlying Congress' enactment of section S(b)(1)(B). When a supervisor is disciplined by a union because of the manner in which he exercised his supervisory or managerial authority-whether or not he was applying a contract provision or adjusting a grievance—that disciplinary action necessarily impinges upon the supervisor's loyalty to his employer. thereby effectively depriving the employer of the undivided loyalty which he has the right to expect under section S(b)(1)(B). The fact that in such a situation the union "may [seek] the substitution of attitudes rather than persons, and may [exert] its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure [is] exerted . . for the purpose of interfering with the [employer's] control over its representatives \* \* \* [and it realistically will] have to replace its foremen or face de facto nonrepresentation

<sup>&</sup>lt;sup>26</sup> Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B.,
— U.S.App.D.C. —, —, 458 F.2d 794, 800 (1972). See Texas Co. v. N.L.R.B., 198 F.2d 540, 542 (9th Cir. 1952), wherein the court stated that "it is clear from the history of the Taft-Hartley legislation that Congress intended to restore to employers the right and power to insist upon the undivided loyalty of their supervisory personnel."

by them."<sup>27</sup> It is therefore intuitively obvious that if the principles underlying the Congressional enactment of section 8(b)(1)(B) are to be given full effect, such conduct by a union cannot be permitted, as the National Labor Relations Board has properly recognized.<sup>28</sup>

The fact that section 14(a) of the N.L.R.A.<sup>29</sup> permits supervisors to be union members does not detract from the undivided loyalty they owe to their employer under section S(b)(1)(B) when they are engaged in supervisory or managerial endeavors. See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B. — U.S.App.D.C. —, 453 F.2d 794, 799-800 (1972). Similarly, the fact that an employer may have consented to the compulsory union membership of his supervisors under an appropriate union-security provision does not negate his

<sup>&</sup>lt;sup>21</sup> San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB No. 252, slip op. at 3, 1968-2 CCH NLRB § 20,195 (1968).

<sup>25</sup> This interpretation of section 8(b) (1) (B) does not mean that a union may never discipline a supervisor/member for breaching a valid union rule. See, e.g., Local 453, Brotherhood of Painters, Decorators and Paperhangers of America, 183 NLRB No. 24, 1970 CCH NLRB § 21,981 (1970). It only proscribes union interference for acts performed by a supervisor relating to his supervisory or managerial duties. See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B., U.S.App.D.C. , 453 F.2d 794 (1972).

<sup>29</sup> U.S.C. § 164(a) (1970) provides:

<sup>(</sup>a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

right to the full protection of section 8(b)(1)(B). Sec Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union, 175 NLRB 1072, 1080 (1969), enfd., 437 F.2d 55 (6th Cir. 1971); Local Union No. 2150, International Brotherhood of Electrical Workers, 192 NLRB No. 16, slip op. at 5, 1971 CCH NLRB § 23,280 (1971).

### B. EFFECT OF ALLIS-CHALMERS AND SCOFIELD

In our previous Meat Cutters decision, we briefly explained why the rationale underlying the Supreme Court's decisions in Allis-Chalmers 30 and Scofield 31 does not relieve a union from responsibility under section S(b) (1) (B) where it imposes disciplinary fines upon supervisor/members because of supervisory or managerial acts performed by them. 32 However, due to the close factual similarity between the instant case and the Allis-Chalmers situation, we believe that an expanded analysis here would be beneficial.

In Allis-Cholmers and Scofield, the Supreme Court sanctioned the imposition of fines by unions on employees—not supervisors—who had violated valid union rules. However, those cases, unlike the present one, concerned the scope of section 8(b)(1)(A) of the Act, 33 not section 8(b)

<sup>30</sup> N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. -175 (1967).

<sup>21</sup> Scofield v. N.L.R.B., 394 U.S. 423 (1969).

<sup>&</sup>lt;sup>32</sup> See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B., —— U.S.App.D.C. ——, 458 F.2d 794, 800-801 (1972).

<sup>33 29</sup> U.S.C. § 15S(b) (1) (A) (1970) provides:

<sup>(</sup>b) It shall be an unfair labor practice for a labor organization or its agents—

<sup>(1)</sup> to restrain or coerce (A) employees in the exer-

(1) (B), with which we are herein concerned. In upholding the union fines in Allis-Chalmers and Scofield, while the Supreme Court did not rely upon the express language of the proviso to section S(b)(1)(A), as the Labor Board had originally done in Minneapolis Star and Tribune Co., 109 NLRB 727 (1954), it did draw "cogent support" for its decision from it.34 See N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 191-192 (1967); Scofeld v. N.L.R.B., 394 U.S. 423, 428 (1969). See also Could, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers, 1970 DUKE L.J. 1067, 1128 (1970). The applicability of that proviso is, however, clearly limited to section S(b)(1)(A), which regulates the union-employee relationship. It is not a part of section S(b)(1)(B), which directly regulates only the union-employer relationship.25 Although reliance

cise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

See 29 U.S.C. § 157 (1970).

<sup>\*\*</sup>Compare Booster Lodge No. 405, International Association of Machinists and Aerospace Workers v. N.L.R.B., U.S.App.D.C. \_\_\_\_, 459 F.2d 1143, 1149, with Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B., U.S.App.D.C. \_\_\_\_, 458 F.2d 794, 800 (1972).

<sup>\*\*</sup>See San Francisco-Oakland Mailers Union No. 18, International Typographical Union, 172 NLRB No. 252, slip op. at 4, 1968-2 CCH NLRB (20,195 (1968); Price v. N.L.R.B., 373 F.2d 443, 446 (9th Cir. 1967), cert. denied, 392 U.S. 904 (1968); Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B., — U.S.App.D.C. —, 458 F.2d 794, 800-801 (1972). See also II Legislative History at 1139, 1141, and 1200.

upon the proviso may not have been critical to the Supreme Court's decisions in Allis-Chalmers and Scofield, the fact that it does not have any application in section 8(b)(1)(B) cases indicates that the rationale underlying those two Supreme Court decisions is not apposite with respect to cases, such as the instant one, which involve the disciplining, by unions, of "supervisors" instead of "employees." Furthermore, a closer evaluation of the Allis-Chalmers and Scofield decisions clearly demonstrates that the reasoning of those opinions is not applicable with respect to section 8(b)(1)(B) cases.

Under the reasoning of Allis-Chalmers and Scofield, only legitimate internal union affairs are protected. See N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 185-187, 195 (1967); Scofield v. N.L.R.B., 394 U.S. 423, 428 (1969). Those cases primarily concerned the relationship between the unions and their employee/members, and the Court concluded that the union discipline had no improper effect on parties external to that relationship. However, when a union imposes discipline upon a supervisor/member for acts performed by him in furtherance of his supervisory or managerial duties, external relationships which are not protected by the rationale underlying Allis-Chalmers and Scofield are affected. The supervisor-em-

<sup>\*\*</sup>Sce also N.L.R.B. v. Sheet Metal Workers, Local 49, 430 F.2d 1348, 1350 (10th Cir. 1970); N.L.R.B. v. Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union, 437 F.2d 55, 57 (6th Cir. 1971).

<sup>&</sup>lt;sup>31</sup> See Silard, Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield, 38 Geo. WASH. L.Rev. 187, 196 (1969):

<sup>[</sup>I]n safeguarding the regulation of union membership from Labor Board review Congress did not authorize unions to violate with impunity the protected rights of other parties—particularly of employers, neutrals, and the public.

ployer relationship is impermissibly affected in an adverse manner, through the union's subversion of the undivided loyalty owed by the supervisor to his employer when he is properly acting to further the interests of his employer. The union also improperly affects the union-employer relationship in a meaningful way. Instead of directly dealing with the employer over the managerial "position" which is displeasing to it, the union attempts to force the acceptance of its view upon the employer indirectly, through the imposition of union discipline upon the employer's chosen representative. Such external ramifications of the union's actions clearly transcend anything protected by the Supreme Court in either Allis-Chalmers or Scoffeld.35

Supreme Court decisions issued subsequent to Allis-Chalmers have made it expressly clear that the Allis-Chalmers rationale only permits "a union \* \* to enforce a properly adopted rule which reflects a legitimate union interest [and] impairs no policy Congress has imbedded in the labor laws \* \* \* Scofield v. N.L.R.B., 394 U.S. 423, 430 (1969) (emphasis supplied), and see 394 U.S. at 429,

<sup>23</sup> It is vitally important to remember that sections 8(b) (1) (A) and 8(b) (1) (B) protect different interests. Section S(b) (1) (A) was only intended to impose some slight controls upon the union-employee relationship, and the legislative history makes it clear that Congress did not intend extensive regulation of the internal union-employee/member relationship. See N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 183-195 (1967). See also National Maritime Union, 78 NLRB 971, 982-987 (1948), enfd., 175 F.2d 686 (2nd Cir. 1949), ccrt. denied, 338 U.S. 954 (1950). Section 8(b) (1) (B), on the other hand, was clearly intended to regulate the external union-employer relationship. It is therefore apparent that considerations concerning the right of a labor organization to regulate its internal union affairs are not really relevant when the union action in question has meaningful external effects upon an employer, in an area wherein the employer is expressly protected under the Act.

432. See N.L.R.B. v. Marine Workers, 391 U.S. 418 (1968); Booster Lodge No. 405, International Association of Machinists and Aerospace Workers v. N.L.R.B., —
U.S.App.D.C. —, —, 459 F.2d 1143, 1150.39 Section 8(b)(1)(B) of the Act expresses a clear Congressional policy aimed at affording employers protection against union interference with their chosen representatives. Whenever union action has the effect of impermissibly inhibiting an employer with respect to his choice of loyal representatives, it is apparent that an express federal labor policy is being violated, and it necessarily follows that the rationale underlying Allis-Chalmers and Scofield cannot be availed upon to nullify the clear section 8(h) (1)(B) violation.40

#### II

Having discussed the general principles which apply to section 8(b)(1)(B) cases such as the instant one, and the applicability of the *Allis-Chalmers* and *Scofield* reasoning to section 8(b)(1)(B) situations, we turn to an evalu-

<sup>&</sup>lt;sup>29</sup> See also District 50, Local 12419, 176 NLRB No. 25, 71 LRRM 1311 (1969); N.L.R.B. v. International Molders and Allied Workers Union, Local 125, 442 F.2d 92, 94 (7th Cir. 1971).

Although there may be some persons unfamiliar with the Congressional attitudes which prevailed in 1947 who might believe that it is not appropriate to treat the fining of supervisor/members for working during a strike differently from the disciplining of employee/members for the same acts, the superficial surface similarity between the two events underlying the union discipline cannot obfuscate the extremely important difference between "supervisors" and "employees" which is recognized by their different treatment under the N.L.R.A. Had the 1947 Congress intended for such persons to be treated alike, it surely would not have enacted section 8(b) (1) (B) and the exclusionary portion of section 2(3) relating to supervisory personnel.

ation of the Labor Board's analysis of the particular facts of this case. We first consider the union fines which were imposed upon the supervisor/members who performed rank-and-file work during the economic strike, and secondly consider the disciplinary action which was taken against those supervisor/members who were instrumental in the formation of the Association.

Although the Employer did not require his supervisors to report to work during the 1968 strike, the Company made it very clear that it wanted them to perform rank-and-file work in place of the striking employees. However, despite the fact that the Company took action to allow its supervisory personnel to exercise their own personal discretion in this matter, Local 134 sought to prevent this by threatening the imposition of discipline on any supervisor/member who decided to further the interests of his Employer by acceding to the request of the Company and performing rank-and-file work during the work stoppage. When Local 134's threats were not sufficient to deter some of the supervisors from honoring the request of their Employer, the union imposed fines of \$500 on each.

The Labor Board correctly recognized that Local 134's disciplinary actions taken by Local 134 were a direct result of the fact that those supervisors who reported to work during the strike placed the interests of their Employer above those of their union. It further emphasized the fact that actions of Local 134 "were designed to change the [Company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [Local 134's] will." The Board concluded that under the reasoning of Oakland Mailers and its prog-

<sup>&</sup>quot;International Brotherhood of Electrical Workers and Local 184, I.B.E.W., 192 NLRB No. 17, T.X.D. slip op. at 7, as adopted by N.L.R.B., slip op. at 2, 1971 CCH NLRB \$\mathbb{2}3,282 (1971).

eny, such conduct contravened the principles enunciated in section 8(b)(1)(B) of the Act. We agree.

The underlying dispute giving rise to the imposition of the penalties in question was directly between the union and the Company—not between the union and the supervisor/members. Local 134 called the strike to encourage a collective bargaining settlement favorable to it. Although the union had the right to insist upon the loyalty of those employee/members who were in the bargaining unit covered by the strike, the Company also had the legitimate right under the N.L.R.A. to call upon the undivided loyalty of its representatives. This latter statutory right of the Employer was particularly apropos in the instant case, due to the strike situation.

It is well recognized that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477, 495 (1960) (emphasis supplied). It is readily apparent, therefore, that when supervisors' actions during an economic strike further the interests of their employer, they are performing in a manner which could reasonably be expected from such persons. See Local Union No. 2150, International Brotherhood of Electrical Workers, 192 NLRB No. 16, 1971 CCH NLRB § 23,280 (1971). See also Texas Co. v. N.L.R.B., 198 F.2d 540 (9th Cir. 1952). As management

<sup>&</sup>lt;sup>42</sup> See N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180-181 (1967). See also Booster Lodge No. 405, International Association of Machinists and Acrospace Workers v. N.L.R.B., — U.S.App.D.C. —, 459 F.2d 1143, 1149-50 (1972).

<sup>43</sup> See Part I(A) of this opinion, supra.

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representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular union involved. Yet this is the precise activity for which the supervisors in question were disciplined by Local 134.4 Under these circumstances, since they were clearly punished for actions undertaken by them as representatives of their Employer within the meaning of section S(b) (1)(B), 4 and in accordance with the Employer's express wishes, it logically follows that the disciplining union thereby violated section S(b)(1)(B) of the Act.

The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective bargaining agents or to act for it in adjusting grievances.<sup>49</sup>

<sup>&</sup>quot;There is no question that supervisors enhance the bargaining position of their employer when they perform rankand-file work during a strike, since their actions reduce the severity of the economic pressure borne by their employer as a result of the work stoppage.

<sup>43</sup> The unions have not challenged the finding of the Labor Board regarding the representative status of the supervisors.

<sup>\*\*</sup>Local Union No. 2150, International Brotherhood of Electrical Workers, 192 NLRB No. 16, slip op. at 6-7, 1971 CCH NLRB ¶ 23,280 (1971). See New Mexico District Council of Carpenters and Joiners of America, 177 NLRB 500, 502 (1969), enfd., — F.2d —, 67 L.C. ¶ 12,403 (10th Cir. 1972); Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v.

The two unions argue that the Labor Board erroneously concluded that the Employer was "restrained or coerced," within the meaning of section S(b)(1)(B), by Local 134's imposition of disciplinary fines, on the theory that the Company did not require its supervisors to perform rankand-file work during the strike. However, this contention overlooks the fact that the Employer clearly expressed his desire by requesting (without ordering) the supervisors to perform such work in furtherance of the Company's bargaining interests. It also ignores the possible detrimental effects which such disciplinary action might have upon the future relationship between the Employer and its supervisors. It is also contrary to the well settled judicial decisions interpreting the meaning of "restraint or coercion."

"[I]n determining whether a §8(a)(1) or §8(b)(1) violation has been committed, the answer does not 'turn on \* \* \* whether the coercion succeeded or failed \* \* \* the test is whether the employer for union | engaged in conduct which, it may be reasonably said, tend[ed] to interfere with the free exercise of [the rights protected] under the Act.' N.L.R.B. v. Illinois Tool Works, 153 F.2d S11, .814 \* \* \* " Local Union No. 167, Progressive Mine Workers of America v. N.L.R.B., 422 F.2d 53S, 542 (7th Cir.), ccrt. denied, 399 U.S. 905 (1970). See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B., - U.S.App. D.C. ---, 458 F.2d 794, 801 n.20. The fact that the Labor Board did not examine the subjective effect upon the Employer of the union discipline with respect to each supervisor does not detract from its conclusion that the disciplinary action was illegal, since the Board reasonably de-

N.L.R.B., — U.S.App.D.C. —, —, 458 F.2d 794, 798-799 (1972); N.L.R.B. v. Sheet Metal Workers, Local 49, 430 F.2d 1348, 1349 (10th Cir. 1970). See also Part I(A) of this opinion, supra, and cases cited therein.

termined that such action meaningfully detracted from the undivided loyalty owed by the supervisors to their Employer. See N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 608 (1969); Radio Officers' Union v. N.L.P.B., 347 U.S. 17, 51 (1954); N.L.R.B. v. Donnelly Garment Co., 330 U.S. 219, 231 (1947). We find substantial evidence in the record considered as a whole to support this Labor conclusion."

# B. SUPERVISORS WHO FORMED THE ASSOCIATION . .

We believe that the Labor Board properly determined that the fining of those supervisors who participated in the formation of the Association constituted a separate section 8(b)(1)(B) violation. The Board resolved this issue in the following manner:

[T]he Bell Supervisors Protective Association arose out of relations among the supervisors, the Company, and the Union, and not " " out of relations solely between the supervisors and the Union. The Association was formed because the Union threatened to fine supervisors for working during the strike, and to protect or aid those who desired to work. As the Association had its inception as a response to what is here found to be illegal union conduct, it is not unreasonable to extend the finding of illegality to cover the Union's fines relating to the Association. Although the Company was not a party to the creation of the Association, the relationship of the supervisors to the Company underl[ay] the creation of the Association just as it underl(ay) the action of the supervisors in working during the strike. To separate the two sets of fines would be highly legalistic and unrealistic, a practice on which the Board has properly frowned on past occasions, prefering [sic] to treat situations "as a whole."48

<sup>&</sup>lt;sup>41</sup> See 29 U.S.C. §§ 160(e) and 160(f) (1970). See also Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951).

<sup>48</sup> International Brotherhood of Electrical Workers and

"INT There the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it in itially, the reviewing court's function is limited. . . . [T]he Board's determination \* \* is to be accepted if it has 'warrant in the record' and a reasonable basis is law." N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111. 131 (1944). We believe that the Labor Board's treatment of this issue not only comports with the general principles underlying section 8(b)(1)(B),6 but that it represents the only reasonable manner of resolving the problem. Were the Board to have permitted the union to discipline those supervisors who formed the Association, it would have subverted much of the protective effect provided the Employer by its determination that section 8(b)(1)(E) was violated by the imposition of fines upon those foremen who performed rank-and-file work during the strike. The formation of the Association was part and parcel of the supervisors' efforts to further the bargaining interests of their Employer during the work stoppage. It had its primary genesis in the illegal position of Local 134 regarding the performance of struck work by the Employer's representatives,50 and, as the Labor Board properly recognized, it would have been wholly irrational

Local 134, 1.B.E.W., 192 NURB No. 17, T.X.D. slip op. at 10, as adopted by N.L.R.B., slip op. at 2, 1971 CCH NLRB [123,282 (1971) (emphasis in original).

<sup>49</sup> Sec Parts I(A) and II(A) of this opinion, supra.

cerned the legality of the union-security provision in the Company-Local 134 collective bargaining agreement, it is important to recognize that it was the strike which precipitated the supervisors' concern regarding this issue. It was not until they realized that Local 134 intended to utilize their forced union membership to subvert their loyalty to the Employer that the supervisors undertook to form the

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for it to ignore this important causative connection. We therefore affirm this aspect of the N.L.R.B.'s decision.

#### Щ

The Labor Board wholly adopted the Trial Examiner's determination that the International Union violated section S(b)(1)(B) of the N.L.R.A., due to its affirmance, on appeal, of Local 134's disciplinary actions. Since the International Union furthered the coercion and restraint concomitant with Local 134's unlawful conduct (1) by affirming the imposition of the fines despite claims of illegality specifically raised by the appealing supervisor/members and (2) by retaining records of these adverse measures which might, in the future, inhibit the performance of supervisory and managerial functions by foremen in accordance with the undivided loyalty owed by them to their Employer, we affirm this Board conclusion.

To rectify the effects of the unfair labor practice, the Labor Board issued the usual cease and desist order, and it affirmatively required both unions (1) to rescind the illegally imposed fines and expunge all records pertaining

Association to protect their position, as well as the interests of their Employer.

International Brotherhood of Electrical Workers and Local 134, I.B.E.W., 192 NLRB No. 17, slip op. at 6-7, 1971 CCH NLRB ¶ 23,282 (1971).

<sup>&</sup>lt;sup>52</sup> See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America v. N.L.R.B., — U.S.App.D.C. —, —, 458 F.2d 794, 799-800 (1972); N.L.R.B. v. Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union, 437 F.2d 55, 57 (6th Cir. 1971); San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB No. 252, slip op. at 2-3, 1968-2 CCH NLRB \(\begin{align\*}
\text{20,195} (1968).

thereto; (2) to provide separate written notices for each disciplined supervisor; and (3) to reimburse the forement for any fines already paid by them. However, with respect to the individual written notice requirement and the provision concerning the reimbursement of already collected fines, the Board only imputed secondary responsibility upon the International Union, with Local 134 being held primarily responsible.

It is clear that the Board's entire remedial order concerning Local 134 is within the broad remedial discretion which it is granted under section 10(c) of the Act. We also believe that the Labor Board's order is wholly appropriate to the extent that it requires the International Union to cease and desist from its unlawful conduct, to rescind all of the illegal fines and expunge all records pertaining thereto, and to ensure that individual written notices are provided each disciplined foreman. However, we are unable to agree with the Board's imposition of monetary liability upon the International Union for the fines which have already been collected by Local 134.

All of the union disciplinary charges concerning the improperly fined supervisors were brought at the Local 134 level. The disciplinary fines were similarly imposed at the Local 134 level, and only Local 134 has sought to collect them. The International Union's sole action with respect to the fines imposed by Local 134 consisted of its

<sup>&</sup>lt;sup>13</sup> 29 U.S.C. § 10(c) (1970). See Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194 (1941); Virginia, Electric & Power Co. v. N.L.R.B., 319 U.S. 533, 540 (1943); Amalgamated Clothing Workers of America v. N.L.R.B., 125 U.S. App.D.C. 275, 281, 371 F.2d 740, 746 (1966); Office and Professional Employees International Union, Local 425 v. N.L.R.B., 136 U.S.App.D.C. 12, 19-20, 419 F.2d 314, 321-322 (1969).

affirmance of them on appeal. Since there is no evidence indicating that the International Union did not exercise good faith when it reviewed Local 134's conduct on appeal, we find that the portion of the Labor Board's remedial order imposing monetary liability on the International Union with respect to the fines already collected by Local 134, was improperly adjudged and cannot be enforced.

The International Union should only be held liable for the illegal fines collected by Local 134, if the local union acted as its agent. "In determining whether any person [was] acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." <sup>65</sup>

This section [§ 2(13)] was enacted to eliminate the strict requirement for proof of authorization and ratification which the Supreme Court read into a somewhat comparable section of the Norris-La-Guardia Act in United Brotherhood of Carpenters and Joiners of America v. United States, 1947, 330 U.S. 395 \* \* But the legislative history of § 2(13) makes plain that Congress intended to do no more than to restore the applicability of common law agency principles of responsibility \* \* \*.

International Ladies Garment Workers Union v. N.L.R.B., 99 U.S.App.D.C. 64, 70, 237 F.2d 545, 551 (1956) (emphasis supplied). See Sheet Metal Workers' International

<sup>55</sup> No approval or specific authorization regarding Local 134's illegal disciplinary action was requested from, or given by, the International Union before or during the course of the local union proceedings. Nor did the International Union Constitution or By-laws mandate such unlawful action by local unions.

<sup>66</sup> Section 2(13) of the N.L.R.A., 29 U.S.C. § 152(13) (1970).

Association v. N.L.R.B., 110 U.S.App.D.C. 302, 309, 293 F.2d 141, 148, cert. denied, 368 U.S. 896 (1961). 27

Where the only action taken by a national or international union is in the nature of an appellate review of the action of a local union, and the national or international union exercises its appellate function in good faith and in the absence of fraud, the national or international union should not be held answerable in damages to a member who was wrongfully disciplined by the local union, See Annotation, 74 A.L.R.2d 783, 800 (1960); Schouten v. Alpine, 215 N.Y. 225, 109 N.F. 244, 246 (1915). See also Madden v. Atkins, 4 N.Y. 2d 283, 174 N.Y.S. 2d 633, 151 N.E.2d 73 (1958). Since there is no claim that the International Union in the instant case did not exercise its review function in good faith and in the absence of fraud." we believe that the Labor Board improperly imposed monetary liability upon it.50 We therefore deny enforce-

propriate occasion.

<sup>&</sup>lt;sup>67</sup> Regarding the relevant legislative history pertaining to section 2(13), see H. Rep. No. 245, 80th Cong., 1st Sess. 11 (1947), in I Legislative History at 302; H. CONF. REP. No. 510, 80th Cong., 1st Sess. 36 (1947), in I Legislative History at 540; 93 Cong. REC. 6442, 6534, and 6859 (1947).

<sup>48</sup> Although the N.L.R.B. argues that the International Union should be held monetarily responsible due to the Board's assertion that the fines imposed by Local 134 were "illegal on their face," we reject this contention. Board and court decisions had not previously defined this extremely difficult area with such exactness that the International Union could reasonably be considered to have affirmed obviously unlawful action by Local 134.

We intimate no view concerning the proper liability of a national or international union in a case where it does affirm a local union's disciplinary action on appeal, where it is clear that the local union's action is unlawful on its face, preferring to leave the resolution of this issue to a more ap-

<sup>[</sup>The International Union's] only action in the case was

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ment to that portion of the Labor Board's remedial order which imposes monetary liability upon the International Union with respect to the illegal disciplinary fines already collected by Local 134, believing that under the particular facts of this case, the imposition of such liability would not meaningfully effectuate the policies of the N.L.R.A.69 However, in all other respects, the remedial order of the Labor Board is enforced in full.

#### IV

The Association has challenged that portion of the Labor Board's decision which upheld the Trial Examiner's refusal to permit the Association to amend the complaint on the last day of the unfair labor practice hearings, to include the allegation that the Company-Local 134 union-security agreement was in violation of section 8(a)(3)(i) of the Act. We must reject this contention.

the exercise of its function to hear the appeal[s] and review the action[s] of the local body. \* \* \* [The International Union] could not be held liable in damages to the [disciplined supervisor/members] because it affirmed [Local 134's actions,] in the absence of fraud or bad faith.

People ex rel. Solomon v. Brotherhood of Painters, Decorators and Paperhangers, 218 N.Y. 115, 112 N.E. 752, 754 (1916).

60 See section 10(c), 29 U.S.C. § 160(c) (1970). The decisions cited by the N.L.R.B. in support of the imposition of monetary responsibility upon the International Union here are not apposite, since they entailed a greater degree of participation by the international unions involved. See, e.g., N.L.R.B. v. Millwrights, Local 2232, 277 F.2d 217, 221 (5th Cir. 1960), cert. denied, 366 U.S. 903 (1961); Local 984, International Brotherhood of Teamsters v. Humko Co., Inc., 287 F.2d 231, 242 (6th Cir.), cert. denied, 366 U.S. 962 (1961).

<sup>&</sup>quot; See note 7, supra.

In May of 1968, the Association filed an unfair labor practice charge with the appropriate regional office of the N.L.R.D., contending that the union-security provision in the collective bargaining agreement between Local 134 and the Company was illegal under section S(a)(3)(i) of the Act, since it covered a unit which included both supervisors and rank-and-file employees. The Regional Director refused to issue a complaint relating to the Association's charge, and the General Counsel of the Labor Board upheld that decision on appeal. On June 10, 1969, the instant section 8(b)(1)(B) case was instituted by the Association. However, neither its charge nor the complaint which was issued pursuant thereto, referred in any manner to the legality of the union-security provision. It was not until the afternoon of the fourth and final day of the hearings before Trial Examiner Reel, that the Association raised this issue with respect to the section 8(b)(1)(B) proceedings. It noted that the collective bargaining agreement containing the challenged provision had already been admitted into evidence, and it argued that the Trial Examiner should resolve the question concerning the provision's legality. The counsel for the General Counsel did not join in, or even consent to, the Association's motion to amend the complaint. The Trial Examiner noted the fact that the General Counsel had previously refused to issue a complaint concerning the legal issue raised by the proposed amendment,63 and he concluded that it would not be appropriate or advisable to permit such a "far

<sup>62</sup> See note 8, supra.

<sup>63</sup> Although the prior charge filed by the Association had alleged a section 8(a) (3) violation, while the proposed amendment suggested a section 8(b) (2) violation, the two charges were based upon the identical allegation that the Company-Local 134 union-security agreement was in violation of the requirements of section 8(a) (3) (i). See note 7, supra.

reaching question" to enter the present litigation through the "back door." 64 The Labor Board fully adopted this determination.

In refusing to permit the Association's requested amendment, the Trial Examiner assumed that he possessed the authority under section 10(b) of the Act 65 to permit such an amendment. Without intimating any view concerning the correctness of this assumptive interpretation,66 we

<sup>\*\*</sup>See International Brotherhood of Electrical Workers and Local 134, I.B.E.W., 192 NLRB No. 17, T.N.D. slip op. at 13, 1971 CCH NLRB § 23,282 (1971). The Trial Examiner also indicated that such union-shop provisions had been present in similar cases recently before the Labor Board, without any indication by it that such agreements might be violative of the N.L.R.A. Id.

es 29 U.S.C. § 160 (b) (1970) provides inter alia: "Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." The scope of this language, which was part of the original 1935 Wagner Act, may have been limited, however, by the enactment in 1947 of an amendment to the N.L.R.A., which provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, \* \* "Section 3(d), 29 U.S.C. § 153(d) (1970) (emphasis supplied). See International Untion of Electrical, Radio and Machine Workers v. N.L.R.B., 110 U.S.App.D.C. 91, 94-95, 289 F.2d 757, 760-761 (1960). See also cases cited note 65, infra.

<sup>66</sup> Compare International Union of Electrical, Radio and Machine Workers v. N.L.R.B., 110 U.S.App.D.C. 91, 94-95 289 F.2d 757, 760-761 (1960) and N.L.R.B. v. Raytheon Co., 445 F.2d 272, 274 (9th Cir. 1971), with Frito Co., Western Division v. N.L.R.B., 330 F.2d 458, 465 (9th Cir. 1964) and United Packinghouse, Food and Allied Workers International

affirm the decision of the Labor Beard, because we do not believe that its determination concerning the proposed amendment can reasonably be considered to be an abuse of discretion.

[The Association's proposed amendment] encompasse[d] charges identical to those [it had previously] filed with the General Counsel; the General Counsel [had] refused to issue a complaint. We would not enterthin a frontal attempt to review the General Counsel's decision, Retail Store Employees Union, Local 254 v. Rethman, 112 U.S.App.D.C. 2, 4, 298 P.2d 330, 332 (1962), and have not been convinced to review [it] here, through the back door.

Retail Clerks Union 1059, R.C.I.A. v. N.L.R.B., 121 U.S. App.D.C. 140, 141 n.1, 348 F.2d 269, 370 n.1 (1965). See International Union of Electrical, Radio and Machine Workers v. N.I.R.P., 110 U.S.App.D.C. 91, 94-96, 289 F.2d 757, 760-762 (1960).

This is certainly not a case where the Labor Board has refused to decide a material issue which was fairly tried by the parties. Sec American Boiler Manufacturers Association v. N.L.R.B., 366 F.2d S15, S21 (8th Cir. 1966). See also Frito Co., Western Division v. N.L.R.B., 330 F.2d

Union v. N.L.R.B., 135 U.S.App.D.C. 111, 119 n.12, 416 F.2d 1126, 1134 n.12, cert. denied, 396 U.S. 903 (1969).

For the purposes of this case, we accept the Labor Board's assumption, due to the fact that we "must judge the propriety of [its] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." S.E.C. v. Chenery Corp., 332 U.S. 194, 196 (1947). See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-169 (1962).

<sup>67</sup> Even the Association concedes that at most, the Board and Trial Examiner were only "under a duty to exercise sound discretion \* \* \*" Brief for the Association at 16.

453, 465 (9th Cir. 1964); American Boiler Manufacturers Association v. N.L.R.B., 404 F.2d 547, 556 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970). The union-security provision in question was only admitted into evidence as part of the applicable collective bargaining agreement. There was no indication, until the end of the proceedings, that its legality was sought to be in issue. The entire unitair labor practice hearings concerned solely the section S(h)(1)(B) case. Furthermore, we do not believe that the resolution of the question raised by the Association's proposed amendment to the section 8(b)(1)(B) complaint would have been as straightforward as it now asserts. Cf. Nassau and Suffolk Contractors Association, Inc., 118 NLRB 174, 181 n.23 (1957). Under these circumstances, we are unable to conclude that the Trial Examiner abused any discretion which he might have possessed,63 and we therefore aftirm the refusal of the Labor Board to permit the Association's proffered amendment to the complaint.69

The decision of the Labor Board is affirmed in its entirety, and enforcement of its remedial order, as modified by this opinion with respect to the monetary responsibility of the International Union concerning the illegal fines already collected by Local 134, is hereby granted.

Judgment accordingly.

<sup>68</sup> See notes 65 and 66, and accompanying text, supra.

the legality of a voluntary union-security provision covering a unit which includes both supervisors and rank-and-file employees. Nor do we foreclose the filing of a new charge by the Association challenging the propriety of any presently existing Company-Local 134 union-security agreement.

WRIGHT, Circuit Judge, concurring in part and dissenting in part: The opinion of my brethren in the majority is so carefully written and closely reasoned that I hesitate to express any disagreement with it. Indeed, insofar as the majority absolves the International of monetary liability and upholds the trial examiner's decision not to permit any amendment to the complaint, I concur in its judgment. But in this age of "strict constructionism" I simply cannot bring myself to believe that the words of Section S(b)(1)(B) mean what the majority says they mean.

I am not suggesting that the Taft-Hartley Act need invariably be given a rigid or literal construction. Labor legislation does not always lend itself to the "plain meaning" school of jurisprudence. Cf. NLRB v. Allis-Chalmers Manufacturing Co., 338 U.S. 175, 179 (1967). But I am suggesting that it is improper for this court to condone a major shift in federal labor policy when the Labor Board can point to nothing in the words of the statute, nothing in its legislative history, and nothing in the ascertainable congressional purpose to support its action. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965). In my view, the determination whether supervisory personnel who are members of a union need protection from union discipline is one "properly made by Congress." For the moment, at least, Congress has decided not to grant supervisors this protection. Cf. 29 U.S.C. § 152(3) (1970); Carpenters District Council of Milwaukee County v. NLRB, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959). Until Congress changes its mind, I do not believe it proper for the Board to graft such protection onto the Act by twisting the clear meaning of an unrelated provision so as

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to serve a purpose which Congress never intended. I must, therefore, dissent from that portion of the majority's opinion and judgment which enforces the Board's Section S(b)(1)(B) order.

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Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B), provides: "It shall be an unfair labor practice for a labor organization or its agents \* \* \* to restrain or coerce \* \* \* an employer in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances . . . The purpose of this provision is clear on its face. It is designed to prevent unions from restricting management's free choice of its agent to bargain with the union or adjust grievances. As Senator Taft explained on the Senate floor, "This unfair labor practice • • o is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y. That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." 2 Lagislative History of the LABOR MANAGEMENT RELATIONS ACT (hereinafter "Legis. Hist.") 1012 (1948). See also Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., 21, in 1 Legis. Hist. 407, 427; speech of Senator Ellender, 2 Legis. Hist. 1077.1

The majority's assertion to the contrary notwithstanding, there is not so much as a word in the legislative history of this or any other section of the Taft-Hartly Act which indicates that § 8(b) (1) (B) was intended to go further and protect supervisors from union discipline. In fact, Congress made quite clear that it had no intention to interfere with the disciplinary activity of unions against members. Sce, c.g., S. Rep. No. 105 on S. 1126, Soth Cong., 1st Sess., 20, in 1 Legis. Hist. at 426.

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That is the way Section S(b)(1)(B) was interpreted for over 20 years after it's initial enactment,2 and during this entire period no one so much as suggested that it had any broader application.5 Then, beginning in 1968, the Labor Board started to erode the original understanding as to the limits of Section 8(b)(1)(B). The process began with the Board's decision in San Francisco-Oakland Mailers' Union No. 18, 172 NLRB No. 252 (1968). In Oakland Mailers, management charged the union with attempting to discipline a foreman for the manner in which he interpreted the collective bargaining contract. Although there was no allegation that the union was attempting to coerce the employer into hiring a new representative for collective bargaining and adjustment of grievances, the Doard nonethelers found a Section S(b)(1)(B) violation. The union's actions, according to the Board, "were designed to change the [company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will." Slip opinion at 2. This was the sort of pressure which Seetion 8(b)(1)(B) was designed to prevent. "That [the union) might have sought the substituiton of attitudes rather than persons, and may have exerted its pressure

<sup>&</sup>lt;sup>2</sup>Sec, c.g., Iron Workers Union v. Perko, 373 U.S. 701, 708 (1963); Cheney California Lumber Co. v. NLRB, 9 Cir., 319 F.2d 375, 331 (1963); NLRB v. Puerto Rico Rayon Mills, Inc., 1 Cir., 293 F.2d 941, 947 (1961); Local 294, Int. Brhd of Teamsters, 2 Cir., 284 F.2d 893 (1960); NLRB v. Int. Ladies' Garment Workers Union, 3 Cir., 274 F.2d 376 (1960); Brhd of Teamsters & Auto Truck Drivers Local No. 70, 183 NLRB No. 137 (1970).

<sup>\*</sup>Thus until recently it seems to have been assumed that, while management was entitled to insist on nonunion supervisory personnel, a union was free to discipline supervisors who were union members. Sec, e.g., Int. Typographical Union Local 38 v. NLRB, 1 Cir., 278 F.2d 6, 12 (1960), affirmed by equally divided Court, 365 U.S. 705 (1961).

upon the [company] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [company's] control over its representatives. Realistically, the [company] would have to replace its foremen or face defacto nonrepresentation by them." Id. at 3.

Standing alone, the Oakland Mailers doctrine places a permissible gloss on the statute. Although Section 8(b) (1)(B) speaks literally in terms of coercing the "selection" of employer representatives, it is clear that management's right to a free selection would be hollow indeed if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance settlement duties. But Oakland Mailers was not permitted to stand alone. After pausing briefly to consolidate its gains, the Board again moved to expand the contours of the statute. In Meat Cutters Union Local 81, 185 NLRB No. 130 (1970), the Board found a Section 8(b)(1)(B) violation when a union attempted to discipline

<sup>\*</sup>Indeed, when a union disciplines a supervisor with the specific intent of forcing management to replace him, the union's conduct falls within the core prohibition of §3(b) (1)(B). See, e.g., Dalles Mailers Union, Local 143 V. NLRB, 144 U.S. App. D.C. 254, 445 F.2d 730 (1971).

The Board won judicial approval of the Oakland Mailers doctrine in Dallas Mailers Union, Local No. 143 v. NLRB, supra note 4; NLRB v. Skeet Metal Workers Int. Assn, Local 49, 10 Cir., 430 F.2d 1343 (1970); and NLRB v. Toledo Locals Nos. 15-P & 272 of Lithographers etc. Union, 6 Cir., 437 F.2d 55 (1971). The doctrine was applied without essential change in New Mexico District Council of Carpenters & Joiners and Galen R. Wilson, 176 NLRB 797 (1969); New Mexico District Council of Carpenters & Joiners and Marvin Freese, 177 NLRB 500 (1969); Houston Typographical Union No. 87, 182 NLRB 592; and Freight, Construction, General Drivers, etc. Union, Local 287, 183 NLRB No. 49 (1970).

a supervisory employee for obeying a company order to institute a new meat procurement policy. Meat Cutters differed from Oakland Mailers in that no one claimed that the new procurement policy had anything to do with the supervisors' grievance settlement or collective bargaining functions. It was thus unclear how management could claim that even a "substitution of attitudes" as to these functions had occurred. To be sure, a supervisor might be indirectly influenced in his bargaining and grievance settlement duties by union discipline exacted for his conduct in an unrelated area. But this danger exists whenever a union disciplines a supervisor, and the Board had explicitly rejected a per se ban on all union discipline of supervisory employees. See Local Union 453, Brhd of Painters, Decorators & Paperhangers, 183 NLRB No. 24

Superficially, Meat Cutters might appear similar to NLRB v. Sheet Metal Workers Int. Asen, Local 49, supra note 5. In Sheet Metal Workers the Board found a § S(b) (1) (B) violation when the union fined a supervisor for performing rank-and-file work ostensibly unrelated to his collective bargaining and grievance adjustment functions, and the 10th Circuit enforced the Board's order. However, a close examination of that case makes clear that the fine was imposed because the supervisor interpreted the union contract in a manner which permitted him to perform the rank-and-file work. See also NLRB v. Teledo Locals Nos. 15-P & 272 of Lithographers etc. Union, supra note 5. Contract interpretation is, of course, part of a supervisor's grievance settlement duties. In Meat Cutters no claim was made that the supervisors were engaged in their grievance settlement functions when they elected to obey the management order to institute a new ment procurement policy.

The case would have been considerably easier if the Board had found that the supervisors were disciplined with the intent to influence their collective bargaining and grievance settlement decisions. Cf. Local Union No. 453, Brhd of Painters, Decorators & Paperhangers, 183 NLRB No. 24 (1970). But no such finding was made.

(1970). Nonetheless, the Board read into the Act a congressional intent to require the undivided loyalty of supervisors to management in the performance of all their management functions and, on the basis of this reading, found a Section 8(b)(1)(B) violation.

When Meat Cutters was appealed to this court; we were clearly concerned that the Board's Section 8(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors, thus giving supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its Meat Cutters brief the Board sought to meet these fears and dispel them. "[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield," the Board argued. "Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. . fact, the Board has recently dismissed a Section S(b)(1) (B) complaint on the ground that the infraction of union rules for which the employer representative was disciplined did not involve the exercise of supervisory or managerial authority." NLRB brief in Meat Cutters Union Local 81 v. NLRB, - U.S.App.D.C. -, 458 F.2d 794 (1972), at 15.

Partially on the basis of these representations we enforced the Board's decision, but with the explicit caveat that "[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has per-

formed duties as a management representative. The N.L.R.B. has made it clear that a union may legally discipline a supervisor-member for acts which are not personal by the individual in furtherance of his obligations as the employer's representative. Meat Cutters Union Local 81 v. NLRB, supra, U.S.App.D.C. at n.12, 458 F.2d at 793-799 n.12. (Emphasis in original.)

After this warning, I would have supposed it would be obvious to the Board that Section S(b)(1)(B) had already been expanded to its limits. Yet the Board now seeks to expand it once again, this time by reading it in a way which, in the words of the learned trial examiner, "stretch[es] the statute beyond what I would otherwise consider the breaking point." Int. Brhd of Electrical Workers, 192 NLRE No. 17 (1971) (trial examiner's decision at 11). Despite the Board's explicit assurance that it would find Section 8(b)(1)(1) violations only when supervisors were fined for "the exercise of supervisory or managerial authority," the Board has here applied the statute to fines levied against supervisors for performance of ordinary rank-and-file work-work which could not possibly be considered to fall within their ordinary managerial responsibilities. This reading of the statute goes beyond Oakland Mailers, beyond Meat Cutters, and beyond anything which the Board has ever suggested in the past.

fines of supervisors doing rank-and-file struck work. See Toledo Locals Nos. 15-P & 272 of Lithographers etc. Union, However, in the Toledo case the supervisors were fined for to perform the work. See 437 F.2d 55 (1971). Interpreting the contract in a manner which permitted them interpretation is clearly a part of a supervisor's normal guishable. See note 6 supra.

As the trial examiner pointed out, the previous cases are

"readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section S(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself has made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in fining the supervisors who worked, or even in finding that the Union's action had any natural or inherent tendency to restrain or coerce the Company.

192 NLRB No. 17 (trial examiner's decision at 9).

Although plainly reluctant to find a § 8(b) (1) (B) violation, the trial examiner nevertheless felt compelled to do so because of the Board's prior decision in New Mexico District Council of Carpenters & Joiners and Galen R. Wilson, supra note 5. A close look at New Mexico District Council, however, makes clear that that case is inapposite. The Carpenters & Joiners Union was held to have violated § 8(b) (1) (B) when it disciplined a supervisor who co-signed a letter urging employees to vote with management in a union election. Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpoint on union members. The board's holding in New Mexico District

Like the trial examiner, I also find "some difficulty" so concluding. In fact, as I hope to show in Part II this opinion, the Board's present interpretation of Sect 8(b)(1)(B), in spite of its explicit language, makes it essentially limitless prohibition against any union displine of supervisory personnel. Moreover, as Part III when show, this expansion of the statute is in the teeth explicit Supreme Court decisions which give it a mover scope. Finally, as I will argue in Part IV, the Board's reading of the statute finds no support in the policy of the Taft-Hartley Act and cannot be justified reference to the Board's discretion in administering ferral labor legislation.

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It seems to be conceded by all parties that, at least theory, Section S(b)(1)(B) does not absolutely prosent all union discipline of supervisors who are union member See majority opinion at note 28. Indeed, the Board held in Local Union 453, Brhd of Painters, Decorators Poperhangers, supra, and Judge MacKinnon's opinion Meat Cutters expressly approved the Local Union & decision. See - U.S.App.D.C. at - n.12, 4 F.2d at 798-799 n.12. The Taft-Hartley Act does n compel supervisors to become union members, and employer is within his rights if he insists that supervisor personnel remain nonunion. But if supervisors are per mitted to join a union, they receive certain benefits from their union membership and incur certain concomitation obligations. Surely it cannot be doubted, for example, the a union could discipline a supervisor for refusing to pa

Council is therefore squarely within the Oakland Mediarule. It is far from obvious, however, that a supervised ordinary duties include performance of rank-and-file wood See text at note 10-11 infra.

his dues, for deliberately disrupting union meetings, or, to cite an example used by the trial examiner, for refusing to join a union bowling league.

To be sure, as Oakland Mailers makes clear, there are also some supervisory activities which Section S(b)(1)(B) makes immune from union discipline. A supervisor-union member is in the difficult position of simultaneously serving two masters. Any sensible interpretation of the statute must, therefore, involve a determination of what obligations a supervisor owes to his union and what obligations he owes to his employer.

In its opinion today, the majority purports to adhere to these principles. It suggests that a supervisor is immune from union discipline only when he is performing "management functions" and that when he is engaged in "non-management" activity the union is free to impose reasonable fines. Unfortunately, however, the majority nowhere defines precisely what it means by "management functions" and it is clear from the way in which the test is applied that it in fact imposes no limits at all on the reach of Section 8(b)(1)(B).

At the outset, it should be clear that the "management function" test does not mean what this court has taken it to mean in the past. In Meat Cutters we upheld the Board's unfair labor practice finding because the supervisors were fined for engaging in usual and traditional management activity. But no one contends that the supervisors in this case were performing functions which supervisors usually or traditionally perform. The record shows that these supervisors were engaged in rank-and-file struck work which, under normal circumstances, was the responsibility of the ordinary employees. Saying that rank-and-file labor is an ordinary management function is like saying that black is white. The two are usually

<sup>10</sup> Thus, as the majority itself concedes, "'Rank-and-file

perceived as diametrical opposites, so that if the one is taken to include the other, the concepts lose all meaning Cf. General Tire & Rubber Co. v. NLRB, 1 Cir., 451 F.24 257, 258-259 (1971).11

Perhaps the majority means to suggest that the supervisors are engaged in a "management function" whenever they take action pursuant to a management order. It should be noted, however, that this reading of the statute is at war with the notion that a supervisor undertakes certain duties when he joins a union and that these duties are enforceable by appropriate union sanctions. Suppose, for example, that management orders its supervisors to disrupt a lawful union meeting. Could it seriously be argued that the union must tolerate this disturbance

work' concerns that work which is ordinarily performed by regular, non-supervisory employees in the bargaining unit." Majority op. at note 4. Inasmuch as the majority also concedes that supervisors can be fined for their nonsupervisory activities, majority op. at note 28, it is difficult to understand the theory under which fines for performance of rank-and-file work are proscribed.

<sup>11</sup> It is interesting that none of the conduct for which these supervisors were punished fell within the description of supervisory functions contained in the Act. Section 2(11) of the Act, 29 U.S.C. § 152(11) provides: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, dicharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Since these "supervisors" were performing none of these functions at the time when discipline was imposed, but rather were assigned to ordinary rank-and-file work, it could be argued that they were not then supervisors within the meaning of the Act and, hence, were not within the ambit of §8(b) (1) (B).

without taking disciplinary action because the supervisors were merely "following orders"? If, as argued above, Section 8(b)(1)(B) leaves intact some duties which supervisor-members owe to their unions, then it cannot be that these duties can be abrogated merely because management orders their abrogation. Moreover, even if the management order test were a defensible limiting principle, it would not support the Board's decision in this case. As would not support the Board's decision in this case. As the majority itself points out, there was no management order here requiring supervisors to perform rank-and-file work. On the contrary, management explicitly informed the supervisors that they would not be required to cross the picket line during the strike, and several supervisors who declined to do-so were subsequently promoted.

My brothren seek to avoid this embarrassment by suggesting that the proper test is not whether the supervisors acted pursuant to a management order, but rather whether their actions were undertaken in the interests of management. It should be apparent, however, that this test fares no better as a limiting principle than the management order test. In fact, to the extent that management and union are viewed as adversaries, it is always in management's interests for the supervisors to take actions which weaken the union. For example, it might well be in management's interest for the supervisors to stop paying their union dues, thereby depleting the union's financial resources and limiting its strike capability. Yet all concede that it would be intolerable for supervisors to retain all the benefits of union membership without any enforceable duty to bear some of the financial burdens.

The "management interest" test also fails to justify the actions of the Board concerning the Bell Supervisors Association issue. The Board found that the union committed a Section S(b)(1)(B) violation when it fined the supervisors for forming the so-called "Bell Supervisors

Protective Association." The Protective Association was formed in part for the purpose of prosecuting an unfair labor practice charge against the company. Thus if one wishes to explain this case in terms of a "management interest" standard, it must be contended that the company had an interest in prosecuting an unfair labor practice against itself!

I submit that there is something inherently wrong with a mode of statutory analysis that yields a product as nonessential as this. This court purports to limit Section E(b)(1)(B) to union discipline for performance of management activities ordered by management or taken in the interests of management. Yet it then proceeds to apply the provision to a nonmanagement activity not ordered by management and directly contrary to management's interests. I am forced to conclude that the unfair labor practices found in this case are ultimately explicable only if one assumes that all union fines of supervisormembers are unlawful on their face. But that is the one theory which my brethren explicitly disavow and which the statute will not permit.

<sup>12</sup> On May 21, 1968, the Protective Association filed an unfair labor practice charge, No. 13-CA-8451, alleging that the company's collective bargaining contract was illegal because the union security clause required that supervisory and nonsupervisory personnel be placed in the same collective bargaining unit. The General Counsel refused to prosecute the complaint, citing Nassau & Suffolk Contractors Assa, Inc., 118 NLRB 174, 177-184 (1957). See Joint Appendix at 201-202. Subsequently, the Protective Association attempted to amend its §8(b)(1)(B) complaint so as to include a similar charge against the union. See JA at 184-185. The trial examiner refused to permit the amendment, and we uphold that decision today. See majority op. at 31-35.

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The Board's rough sailing through the complexities of Section 8(b)(1)(B) might, perhaps, be more understandable if the seas were entirely uncharted. But in fact union discipline of strikebreakers and other dissidents has been the subject of a series of important Supreme Court decisions which the Board inexplicably chose to ignore. These decisions, unlike the Board's appreach, set out a rational, workable interpretation of Section 8(b)(1) which balances the union's right to enforce reasonable discipline against the rights of employers and union members to be free from union overreaching. They should, I think, control the outcome of this case.

The first and most important of these decisions is NLRB v. Allis-Chalmers Manufacturing Co., supra. In all relevant respects, Allis-Chalmers is indistinguishable from this case. There, as here, the union sought to impose reasonable fines on union members who had crossed a picket line during a lawful strike. In Allis-Chalmers, however, none of the fined members were supervisors, so the relevant provision governing the union's conduct was subsection (A) of Section S(b)(1) rather than subsection (B).13 However, when the Supreme Court found the union innocent of any unfair labor practice, it did so not because of anything in subsection (A), but rather because of its interpretation of the words "restrain or coerce" which are common to subsections (A) and (B). See Christensen, Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy, 43 N.Y.U. L. Rev. 227, 268 (1968). Thus the Court stated: "It is highly unrealis-

Section 3(b) (1) (A), 29 U.S.C. § 158(b) (1) (A), provides, in relevant part: "It shall be an unfair labor practice for a labor organization or its agents \* \* \* to restrain or coerce \* \* \* employees in the exercise of the rights guaranteed in section 157 of this title \* \* \*."

tic to regard § S(b) (1), and particularly its words 'restrain or coerce,' as precisely and unambiguously covering the union conduct involved in this case." 388 U.S. at 179 (Emphasis added.) On the contrary, such a reading of Section S(b)(1) would "attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort 'to fashion a coherert labor policy' and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon." Id. at 183.

Of course, Allis-Chalmers did not mean that unions were free to impose discipline for any purpose at all. Section S(b)(1) must be read so as to conform with the other provisions of federal labor law. Sec, e.g., NIB v. Int. Ladies' Garment Workers Union, 3 Cir., 274 F.2d 376 (1960); Silard, Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield, 38 GEO. WASH. L. REV. 187, 193-196 (1969). Thus if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b) (1)." Scofield v. NLRB, 394 U.S. 423, 431 (1969). Sec NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968). But if one thing is clear after Allis-Chalmers, it is that there is no "overriding policy of the labor laws" which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rankand-file struck work. In fact, quite the contrary is true

"Integral to [the] federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly

vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]ho power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ' ""

NLRB v. Allis-Chalmers Manufacturing Co., supra, 388 U.S. at 181. (Footnotes omitted.)

The majority utilizes two arguments in attempting to distinguish Allis Chalmers. First my brethcen contend that the Allis-Chalmers Court relied on the proviso in Section S(b)(1)(A)-a proviso which is not attached to subsection (B) of Section S(b) (1)." I must admit I find it difficult to understand how the majority can maintain this position in light of the Allis-Chalmers Court's explicit disclaimer of any reliance on the proviso.15 As Mr. Justice Black pointed out in dissent: "Since the union resorted to the courts to enforce its fines instead of relying on its own internal sanctions such as expulsion from membership, the Court correctly assumes the the proviso to § 8 (b) (1)(A) cannot be read to authorize its holding." 383 U.S. at 200. (Emphasis added.) Only a few months ago Judge MacKinnon, speaking for a unanimous panel, characterized the holding in Allis Chalmers as follows: "Instead of relying on the express language of the proviso, \* \* \* the

<sup>&</sup>lt;sup>14</sup> The proviso states: "Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein \* \* \*."

<sup>25</sup> Thus the Allis-Chalmers plurality held: "It is no answer that the proviso to §8(b)(1)(A) preserves to the union the power to expel the offending member," 3SS U.S. at 183 (emphasis added), and upheld union fines, not within the scope of the proviso, because "literal application of the imprecise words 'restrain or coerce' \* \* \* [would produce] \* \* \* extraordinary results \* \* \*." Id. at 184.

Supreme Court carefully analyzed the entire legislative history of Section S(h)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion.'"

Booster Lodge No. 405, Int. Assn of Machinists v. NLRB,

U.S.App.D.C., —, —, F.2d, —, (Nos. 24,687 & 24,774, decided February 3, 1972) (slip opinion at 7-8). In light of this statement, I am frauldy amazed to see the proviso argument resurrected at this late date."

Perhaps sensing that substantial reliance on the proviso does little to advance its position, the majority resorts to a second argument. Allis-Chalmers, it is argued, dealt only with internal union rules affecting the relationship between a member and the labor organization to which he belongs. Here, however, the union rule had an "effect on parties external to [the union-member] relationship" and therefore falls outside the Allis-Chalmers rationale. Majority opinion at 18.

<sup>16</sup> To support its argument that the proviso makes the Supreme Court's Allis-Chalmers decision irrelevant to § 8(b) (1) (B) cases, the majority cites Gould, Some Limitations Upon Union Discipling Under the National Labor Relations Act: The Radiations of Allis-Chalmers, 1970 DUKE L. J. 1067, 1128. This is what Professor Gould says at the page cited: "Of course, the existence of the proviso was not critical to the Court's conclusion in Allis-Chalmers although it did provide 'cogent support.' In Allis-Chalmers the Court was primarily concerned with an assessment of the language 'restrain or coerce'-language which is applicable to section 8(b) (1) (B) as well as section 8(b) (1) (A). Therefore, the mere failure of Congress to attach the proviso to section 8(b) (1) (B) does not establish the conclusion that a union's internal affairs are to be excluded from consideration." Interestingly, Professor Gould ultimately concludes that under Allis-Chalmers §8(b)(1)(B) does permit unions to fine supervisor-members for performance of struck work. 1970 DUKE L. J. at 1128-1129.

This distinction is so subtle that someone in an uncharitable frame of mind might be tempted to characterize it as altogether chimerical. It seems clear, for example, that the union rule in Allis-Chalmers had, and was intended to have, an external effect on the employer. By deterring strikebreakers, the rule assured union solidarity and thereby allowed the union to bring greater economic pressure on the company. I simply cannot understand why the anti-strikebreaking rule in Allis-Chalmers should be characterized as "internal" while precisely the same sort of anti-strikebreaking rule in this case suddenly becomes "external."

Perhaps there is nonetheless some substance to the internal-external dichotomy, but the distinction, if one exists, was apparently too subtle for the Supreme Court to grasp. In Scofield v. NLRB, sugra, the Court unambiguously rejected the internal-external test as a basis for resolving Section 8(b)(1) cases. "It is doubtless true," the Court conceded, "that the union rule in question here affects the interests of all three participants in the labormanagement relation: employer, employee, and union. Although the enforcement of the rule is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization. But as Allis-Chalmers and Marine Workers made clear, it does not follow from this that the enforcement of the rule violates § S(b) (1) (A), unless some impairment of a statutory labor policy can be shown." 394 U.S. at 431-132. (Footnote omitted.) Similarly, I do not see why the external impact of this union rule should affect its validity. The majority ignores the fact that the very purpose of having a union is to affect external relations between employees and their employer. All union rules are therefore "external" since they are all designed to insure a strong and united front among union members when the union confronts its employer adversary. AllisChalmers, Scofield and Marine Workers stand for the proposition that such rules may nonetheless be enforced "unless some impairment of a statutory labor policy can be shown." And Allis-Chalmers makes clear that there is no impairment of "statutory labor policy" when, as here, a union takes reasonable action to insure strike solidarity among its members.

## IV

Of course, it is true that Allis-Chalmers dealt with fines imposed on ordinary members while here the fines were imposed on supervisors. As argued above, this fact is without relevance to the problem of statutory construction, since the Allis-Chalmers Court relied on the general language of Section S(b)(1) which is applicable to both subsections (A) and (B). Nonetheless, the difference between the two cases might be relevant to the existence of a countervailing "statutory labor policy" which would justify finding a Section S(b)(1) violation. Specifically, the majority argues that, even if there is no "statutory labor policy" favoring the freedom of union members to perform struck work, there is such a policy which favors insulating supervisory personnel from union discipline.

If this argument is kept within proper bounds, I think it has some validity. Indeed, I think Section S(b)(1)(B) itself expresses a statutory labor policy which favors allowing supervisory personnel to perform their collective bargaining and grievance settling functions free from union coercion. That, as I understand it, was the holding of Oakland Mailers, and I have no quarrel with that decision. But the Board has not kept this argument within proper bounds. Instead, the Board purports to find a broader "statutory labor policy" requiring that the supervisor's absolute duty to his employer always take precedence over any conflicting duty to his union.

With all respect, I think this policy has been manufactured out of whole cloth. While the majority finds it "intuitively obvious" that such a policy exists, majority opinion at 15, it is unable to cite a single court decision, a single provision in the statute, or a single element of the legislative history to support its conclusion. To be sure, legislative history to support its conclusion. To be sure, Section 2(3) of the Act allows an employer to keep his supervisors out of the union, and a union may even commit an unfair labor practice if it bargains to an impasse over unionization of supervisors. See International Typographical Union v. NLRB, 1 Cic., 278 F.2d 6 (1960). Typographical Union v. NLRB, 1 Cic., 278 F.2d 6 (1960). But here the employer chose not to exercise his option to have nonunion supervisors. The company agreed that supervisory personnel would be naion members, and Section 14(a) of the Act makes that agreement legal.

Council of Milwaukee County v. NLRB, 107 U.S. App. D.C. 55, 57, 274 F.2d 551, 566 (1959), to the effect that an employer is free to discharge supervisors to prevent them from joining unions. But no one is claiming that employers have a statutory obligation to allow their supervisors to become union members. Rather, the issue in this case is whether anything in the Act prohibits a union from enforcing anything in the Act prohibits a union from enforcing reasonable obligations of union membership against supervisors once the employer has decided to allow his supervisory personnel to assume union membership.

<sup>&</sup>quot;Section 2(3), 29 U.S.C. § 152(3) (1970), provides: "The term 'employee' shall include any employee \* \* \* but shall not include any individual employed as \* \* \* a supervisor not include any individual employed as \* \* \* a supervisor \* \* \* ." Section 7, 29 U.S.C. § 157 (1970), in tura, guarantees to "employees" only the right to form or join labor unions.

<sup>&</sup>quot;Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

We can be safe in assuming that neither the union nor management agreed to the unionization of supervisors because of an abstract belief in the virtues of trade unionism. The union presumably insisted on this clause in the contract so that it would have some control over the actions of supervisors, and management presumably accepted it because the union gave up something else in return. By enacting Section 14(a) which permits supervisors to join unions, Congress expressly permitted management and labor to reach just such an agreement. See also 29 U.S.C. \$153(a)(3)(i) (1970). Yet now management seeks to abrogate its part of the bargain by insisting that supervisors obey management alone. Like the Supreme Court, I can "discern no basis in the statutory labor policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." Scofield v. NLRB, supra, 394 U.S. at 433.

Nor can I see a basis in federal labor policy for permitting supervisors to retain all the benefits of union membership while incurring none of the costs. As Professor Gould has pointed out:

· [S]upervisors who remain union members are most often obtaining additional benefits. Frequently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the Allis-Chalmers rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign.'

Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Altis-Chalmers, 1970 Duke L. J. 1067, 1129 (1970).

To be sure, the Labor Board is entitled to great deference when it interprets the act it administers. See, e.g., Brooks v. NLRB, 348 U.S. 96 (1954); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1955). But this deference has its limits. In the final analysis, "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself \* \* \* " SEC v. Cheaery Corp., 332 U.S. 194, 215 (1947) (Mr. Justice Jackson, dissenting).

In my view, the Labor Board's action in this case was outside the law. I submit that the Section S(b)(1)(B) requirement that unions not "restrain or coerce" an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work. I would therefore decline to enforce the Board's order.

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## In the Supreme Court of the United States

OCTOBER TERM, 1973

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.<sup>1</sup>

### OPINIONS BELOW

The en banc opinion of the court of appeals (Florida Power Pet. App. A, pp. 3-75) <sup>2</sup> is not yet officially

<sup>2</sup> "Pet. App." refers to the appendices to the petitions in *Florida Power*, No. 73-556, or *Illinois Bell*, No. 73-549, as indicated.

<sup>&</sup>lt;sup>1</sup>The petition covers two cases which were consolidated for purposes of argument and decision in the court of appeals—International Brotherhood of Electrical Workers, AFL-CIO, et al. v. National Labor Relations Board, No. 71-1559 (hereafter Illinois Bell), and International Brotherhood of Electrical Workers, Locals 641, et al. v. National Labor Relations Board, et al., No. 71-1712 (hereafter Florida Power). The charging parties in both cases have filed petitions for certiorari, Nos. 73-549 and 73-556, respectively.

reported. The decisions and orders of the National Labor Relations Board (*Florida Power* Pet. App. B, pp. 77–102 and *Illinois Bell* Pet. App. 26a–41a) are reported at 193 NLRB 30, and 192 NLRB 85, respectively.

## JURISDICTION

The judgment of the court of appeals (Florida Power Pet. App. A, pp. 1-2) was entered on June 29, 1973. On September 19, 1973, the Chief Justice extended the Board's time for filing a petition for a writ of certiorari to and including November 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining members who are supervisors for crossing a picket line and performing rank-and-file work during an economic strike against the employer.

## STATUTES INVOLVED

The relevant provisions of the National Labor Relation Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

Section 2. When used in this Act-

- (3) The term "employee" shall include any employee, \* \* \* but shall not include \* \* \* any individual employed as a supervisor \* \* \*.
- (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, re-

call, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

Section 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

### STATEMENT

## A. THE BOARD'S DECISIONS

## 1. ILLINOIS BELL

For many years, Local 134, IBEW, has been recognized by Illinois Bell Telephone Company as the bargaining representative, not only for rank-and-file em-

ployees, but also for certain supervisors working at its Chicago, Illinois "Plant Department." Under the terms of the union security clause of the collective bargaining agreement, all members of this bargaining unit—including "P.B.X. Installation Foremen," "Building Cable Foremen" and "General Foremen"—must become and remain members of Local 134 (Illinois Bell Pet. App. 28a-29a). It is undisputed that these foremen are supervisors within the meaning of Section 2(11) of the Act, and that they adjust employee grievances on behalf of Illinois Bell (id. at 30a).

Between May 8 and September 20, 1968, Local 134 engaged in an economic strike against Illinois Bell (id. at 29a). The Company informed the foremen that it would like them to work, but that the decision whether to do so would be left to each foremanthose who refrained from working would not be penalized (ibid.). Local 134, however, warned the foremen that they would be subject to discipline if they performed rank-and-file work during the strike (ibid.).

During the strike, some foremen crossed the union's picket line and performed rank-and-file work, while others stayed away from the plant (id. at 30a). After the strike, Local 134 imposed fines of \$500 upon each foreman who had performed rank-and-file work during the strike (ibid.). Most of the fined foremen ap-

<sup>&</sup>lt;sup>3</sup> Local 134 also imposed fines of \$1,000 upon each of the five foremen who had formed an association (Bell Supervisors Protective Association) to obtain counsel for and otherwise protect those foremen who chose to work during the strike (Illinois Bell Pet. App. 29a-30a).

pealed to the International Union, which, except where there was procedural irregularity, sustained

the fines (ibid.).

Upon charges filed by the Bell Supervisors Protective Association (see p. 4, supra, n. 3), the Board (Member Fanning dissenting) held that Local 134 and the International Union, in so disciplining supervisor-members, violated Section 8(b)(1)(B) of the Act. The Board followed its decision in Local 2150, IBEW (Wisconsin Electric Power Co.), 192 NLRB 77, issued the same day, wherein the Board had stated (id. at 78):

During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collectivebargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives. \* \* \* The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. \* \* \*

The Board ordered the unions, *inter alia*, to rescind the fines levied against the supervisors, to expunge all records of the fines, and to reimburse the supervisors for any portions of the fines paid (*Illinois Bell* Pet. App. 33a-34a; see *id.* at 23a-25a).

## 2. FLORIDA POWER

Since 1953 System Council U-4 has represented eleven local unions of the IBEW in collective bargaining with Florida Power & Light Company (Florida Power Pet. App. A. p. 5). The collective bargaining agreement does not require employees in the bargaining union to become members of the union; accordingly, union membership is voluntary (ibid.). The bargaining unit consists not only of rank-and-file employees, but also of supervisors who are union members (id. at 6). Other higher ranking supervisors have also retained membership in the union, although the union does not represent them in collective bargaining (id. at 6-7). Both unit and non-unit supervisors are supervisors within the meaning of Section 2(11) of the Act, and they possess and exercise authority to adjust employee grievances on behalf of Florida Power, and to act as its representative in matters involving collective bargaining (Florida Power Pet. App. B, p. 81).

<sup>&</sup>lt;sup>4</sup> However, three of the supervisors supervised and adjusted the grievances of only employees outside the bargaining unit (Florida Power Pet. App. B, p. 81).

Between October 22 and December 28, 1969, the local unions engaged in an economic strike against Florida Power (Florida Power Pet. App. A, p. 9). Both unit and non-unit supervisors crossed the picket lines and performed work, including some work normally performed by rank-and-file unit employees (ibid.). After the strike, five of the local unions fined, in amounts up to \$6,000, and/or expelled from membership in the union and the System Council U-4 Death Benefit Fund, those supervisors who had worked during the strike (id. at 9-10).

Upon charges filed by Florida Power, the Board (Member Fanning dissenting), relying upon its two prior decisions in *Illinois Bell* and *Wisconsin Electric*, supra, held that the five locals violated Section 8(b) (1)(B) of the Act by disciplining supervisors "for performing struck work" (Florida Power Pet. App. B, pp. 82-83). The Board ordered the locals, inter alia, to rescind and refund all fines, to expunge all records of the disciplinary proceedings involving the fined supervisors, and to restore those persons to full membership in the union and the Death Benefit Fund (id. at 85-88).

## B. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in a 5-to-4 en banc decision, concluded that "Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-

The en banc decision replaced an earlier panel decision in Illinois Bell, 81 LRRM 2257 (Forida Power Pet. App. F, pp. 123-179).

and-file struck work" (Florida Power Pet. App. A. p. 52). The majority was of the view that Section 8(b) (1)(B) went no further than to proscribe union attempts to discipline supervisors for the manner in which they performed their management functions. and that there was little likelihood that discipline of supervisors for performing rank-and-file struck work would significantly affect the performance of those functions. The majority reasoned that, "when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory emplovees, he is no longer acting as a management representative \* \* \*. [T]he supervisors will not be serving two masters at the same time. They will be serving them at different times" (Florida Power Pet. App. A. pp. 24-25; internal quotation marks omitted).

The dissenters stated, inter alia, that the majority (1) was "unrealistic" in asserting that the supervisors' performance of rank-and-file work during a strike was "totally unrelated" to the collective bargaining process and their responsibilities in it, and (2) was unwarranted in reversing the Board's determination that the unions' imposition of sanctions on the supervisors would adversely affect their loyalty to their employers regardless of the type of work they performed during a strike (Florida Power Pet. App. A, pp. 60-63).

## REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals, that Section S(b)(1)(B) of the Act does not protect supervisormembers of a union from union discipline for crossing a picket line and performing rank-and-file work during an economic strike, conflicts with the decisions

of two other courts of appeals. In National Labor Relations Board v. Local 2150, International Brother-hood of Electrical Workers, No. 71-1864, decided July 13, 1973, 83 LRRM 2827 (Florida Power Pet. App. D, pp. 105-117), the Seventh Circuit sustained the Board's decision in Wisconsin Electric, supra, which the Board followed in the two cases involved here. The Seventh Circuit stated that it disagreed with the view of the court of appeals majority in the instant cases that the "performance of ordinary rank-and-file work \* \* \* could not possibly be considered to fall within their [the supervisors'] ordinary managerial responsibilities," and the Seventh Circuit "align[ed] ourselves more closely" with the contrary view of Judge Mac-Kinnon (id. at p. 113). Similarly, in National Labor

Indge Wright, who dissented from the panel decision in Illinois Bell (p. 7, supra, n. 5), wrote the opinion for the majority when the court subsequently sat en bane to consider both Illinois Bell and Florida Power. Judge MacKinnon, who wrote the opinion for the panel majority in Illinois Bell, wrote

the minority en banc opinion.

<sup>&</sup>lt;sup>6</sup> It is in accord with the decision of the Ninth Circuit in National Labor Relations Board v. San Francisco Typographical Union No. 21. Nos. 71-2949 and 71-2987, decided May 18, 1973. 83 LRRM 2314, petition for rehearing en banc pending (Florida Power Pet. App. E. pp. 119-122).

<sup>\*</sup>The Seventh Circuit noted that the facts in Illinois Bell were different in several respects from those in Wisconsin Electric, and that it intimated "no view as to whether the differences call for a different resut" (Florida Power Pet. App. D. p. 110, n. 8). The court added, however, that the facts of Wisconsin Electric were similar to those in Florida Power, and that thus, "[a]t the very least, insofar as \* \* \* [the District of Columbia Circuit] reaches an opposite conclusion on these facts, we disagree with \* \* \* [its] majority opinion \* \* \*" (ibid., n. 7).

Relations Board v. Toledo Locals Nos. 15-P and 279 of the Lithographers and Photo-Engravers International Union (Toledo Blade Co.), 437 F. 2d 55, the Sixth Circuit sustained the Board's holding (175 NLRB 1072) that a union violated Section 8(b)(1) (B) by fining supervisor-members for continuing to work in the engraving department during a strike, in a work crew smaller than that specified in the collective bargaining agreement. "This conduct of the union," the Sixth Circuit stated, "could very well be considered as an endeavor to apply pressure on the supervisory employees of the [company] \* \* \* and to interfere with the performance of the duties which the employer required them to perform during the strike, and to influence them to take action which it, the employer, might deem detrimental to its best interests." 437 F. 2d at 57.

As the court of appeals acknowledged both in its opinion and by its action in sitting en banc, these cases present "an important question of first impression arising under the National Labor Relations Act \* \* \*" (Florida Power Pet. App. A, p. 4).

The question whether Section 8(b)(1)(B) protects employers from union discipline of supervisor-members who engage in the well-recognized practice of assisting their employer during an economic strike is a recurrent one in the administration of the Act. In addition to the present cases and those previously cited, supra, pp. 9-10, see, e.g., Operating Engineers, Local 953 (David Erven), 200 NLBB No. 91, 82 LRRM 1286; Operating Engineers, Local 501 (Anheu-

ser Busch, Inc.), 199 NLRB No. 91, 81 LRRM 1306, pending on petition to enforce, No. 73-1259 (C.A. 9); Pattern Makers (Leitzau Pattern Co.) 199 NLRB No. 14, 81 LRRM 1177; Erie Newspaper Guild, Local 187 (Times Publishing Co.), 196 NLRB No. 159, 80 LRRM 1364, pending on petitions to review and enforce, Nos. 72-1251, 72-1633 (C.A. 3); Lithographers, Local 261 (Manhardt-Alexander, Inc.), 195 NLRB 408; Teamsters Local 663 (Continental Oil Co.), 193 NLRB 581; Sheet Metal Workers, Local 71 (H. J. Otten Co.), 193 NLRB 23; Milwaūkee Printing Pressmen Union No. 7 (North Shore Publishing Co.), 192 NLRB 914.

In view of the conflict and the importance of the issue, review by this Court is appropriate.

2. The decisions of the Board in these cases which the court of appeals overturned were correct, and the court of appeals erroneously construed the Act. Section 8(b)(1)(B) of the Act makes it unlawful for a labor organization

to restrain or coerce \* \* \* an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances \* \* \*.

Although the provision is obviously intended to preclude the union from attempting to restrict the employer's free choice of its agent to bargain with the union or adjust grievances (*Florida Power* Pet. App. A, p. 15), the Board, with court approval, has recognized that the purposes of the provision can best be effectuated by also applying it to situations where the

union seeks, not to change the identity of the man. agement representative, but to dictate the manner in which the selected representative performs his collective bargaining and grievance adjustment duties San Francisco-Oakland Mailers' Union No. 18, 172 NLRB 2173, and cases cited at Florida Power Pet. App. A, pp. 19-20. The court below acknowledged that Section 8(b)(1)(B) could thus be extended beyond its literal reach (Florida Power Pet. App. A, p. 18) and that, indeed, it would protect a supervisor against discipline when he "crosses a picket line to perform supervisory work" (id. at 24). It concluded, however. that the Section affords no protection "when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees," for then "he is no longer acting as a management representative" (id., at 24-25). We submit that the latter conclusion is erroneous.

As the Seventh Circuit pointed out in Local 2150 (Wisconsin Electric):

[I]t can hardly be doubted that it is an essential part of the economic warfare involved in a strike for management to muster its resources in an effort to withstand the union's economic coercion. Equally undisputable, it would seem, is that an employer is not limited to combatting a strike only with his pocketbook while the business lies idle. Rather, management has "traditionally" \* \* \* relied upon supervisors, where practicable, to pitch in and perform rankand-file work in an attempt both to strengthen its bargaining position and to preserve the enterprise from collapse during an adverse economic repercussion following a strike. Insofar

as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. Indeed, in a real sense they are representing the employer for the purpose of collective bargaining, for "the use of economic pressure by the parties to a labor dispute \* \* \* is part and parcel of the process of collective bargaining." \* \* \* [Florida Power Pet. App. D, pp. 113-114.]

The Board's conclusion that Section 8(b)(1)(B) of the Act proscribes union discipline of supervisors who are union members for supporting their employer during an economic strike harmonizes that section with other provisions of the Act. Under Section 2(3), supervisors, as defined in Section 2(11), are excluded from the statutory definition of "employee," and are thus removed from the protection of the Act. This exclusion was "intended to restore to employers the right and power to insist upon the undivided loyalty of their supervisory personnel" (Texas Co. v. National Labor Relations Board, 198 F. 2d 540, 542 (C.A. 9)), during a strike 10 no less than at other times.

Nor is the view of the court below that, "[w]hen Congress recognized that an employer should be able to have supervisors who owe him their undivided

<sup>&</sup>lt;sup>9</sup> See the portions of the legislative history set forth at Florida Power Pet. App. A, pp. 39, 66-68.

<sup>&</sup>lt;sup>10</sup> See H. Rep. No. 245, 80th Cong., 1st Sess. 15–16, I Legislative History of the Labor-Management Relations Act, 1947 (hereafter "Leg. Hist.") 306–307; S. Rep. No. 105, 80th Cong., 1st Sess. 5, I Leg. Hist. 411; 93 Cong. Rec. 4136, 4137, II Leg. Hist. 1065 (Senator Ellender).

loyalty, it gave the employer a specific means to achieve such loyalty—the right \* \* \* to require employees to relinquish union membership upon promotion to a supervisory position" (Florida Power Pet. App. A, p. 29), supported by Section 14(a), which provides:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The "first part of [Section 14(a)] was included presumably out of an abundance of caution," for there was "nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, I Leg. Hist. 564. The remaining part of the provision merely makes "clear that an employer could not be compelled to treat his supervisors like other statutory 'employees,' even if they remained in the union" (Florida Power Pet. App. A, p. 68). In sum, as the dissenting judges below properly concluded: "There is just nothing in the legislative history to indicate that Congress assumed that if an employee permitted his supervisors to remain in the union, he thereby impliedly accepted their dual loyalty" (ibid.)."

<sup>&</sup>lt;sup>11</sup> Contrary to the reasoning of the court below (Florida Power Pet. App. A. pp. 30-36), National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, does not sup-

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert H. Bork, Solicitor General.

Peter G. Nash, General Counsel,

JOHN S. IRVING, Deputy General Counsel,

Patrick Hardin,
Associate General Counsel,

NORTON J. COME, Deputy Associate General Counsel,

WILLIAM H. DUROSS, III, Attorney,

National Labor Relations Board.

NOVEMBER 1973.

port its decision. The issue there was whether union fines against employee-members for strikebreaking constituted an unfair labor practice under Section 8(b)(1)(A) as a restraint or coercion of those employees in the exercise of their Section 7 right to refrain from concerted activities. Here the question is whether the imposition of discipline against supervisor-members for performing struck work is an unfair labor practice under Section 8(b)(1)(B) as a restraint or coercion of the employer in his right to select and retain loyal representatives. "Since Sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests, it simply does not follow that discipline which does not amount to restraint or coercion of the employee under the former cannot constitute restraint or coercion of the employer under the latter." Local 2150 (Wisconsin Electric), supra, 83 LRRM at 2832 (Florida Power Pet. App. D, p. 115).

U.S. GOVERNMENT PRINTING OFFICE: 1973

# In the Supreme Court of the United States October Term, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY, PETITIONER

V

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The question presented by the petition is whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), by disciplining union members who are supervisors for performing the work of rank-and-file employees during a strike. The Board intends to file a petition for a writ of certiorari in the instant case and its companion, which will

In the court below, the instant case, No. 71-1712, was consolidated with *International Brotherhood of Electrical Workers* v. National Labor Relations Board, No. 71-1559 (Pet. App. 3).

present the same issue. Accordingly, we do not oppose the petition.

Respectfully submitted.

ROBERT H. BORK, Solicitor General.

Peter G. Nash, General Counsel, National Labor Relations Board. November 1973.



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# Supreme Court of the United States

OCTOBER TERM, 1973

No.\_\_\_\_\_

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 AND 1263, Respondents,

and

NATIONAL LABOR RELATIONS BOARD, Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Respondents, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Unions 641, 622, 759, 820 and 1263, reply to the Petitioner's Petition For a Writ of Certiorari to review the Decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 29, 1973.<sup>1</sup>

## QUESTION PRESENTED

Whether the Respondent Unions violated Section 8(b) (1) (B) of the National Labor Relations Act, 29 U.S.C. 158(b) (1) (B), by levying fines and imposing other sanctions against Company supervisors who are members of the Union for crossing Union picket lines and perform rank-and-file bargaining unit work during an economic strike.

## STATEMENT

# A. Respondents' Exception To Petitioner's Statement of Question Presented.

Respondents have excepted to the statement of the question presented for review by this Court. As presented, it does not clearly state the type of work which was performed by supervisors who were members of the Union and crossed the Union's picket lines during an economic strike. The work performed by these supervisors who are members of the Union was bargaining unit work which is normally performed by the rank-and-file members and employees of the Petitioner. The question as presented by the Petitioner only identifies the work as "Company Work" failing to specify the type of work performed by supervisor-members behind the picket line for which fines and other sanctions were imposed by the Respondents. (P-2)

<sup>&</sup>lt;sup>1</sup>The Decision as of the date of printing has not yet been officially reported.

Respondents have therefore restated the question presented. Respondents maintain that the question presented by it more clearly and accurately focuses attention by the issues presented in this case.

## B. The Board's Decision and Order.

The Board did conclude, on stipulated facts and issues, that Respondent-Unions had restrained and coerced the Petitioner in the selection of its representatives for collective bargaining and adjustment of grievances in violation of Section 8(b) (1) (B) of the Act, by the impositions of fines and other sanctions on supervisors who are members of the Union and crossed picket lines and performed bargaining unit work during an economic strike. Member Fanning, dissenting, found no violation and would dismiss the Complaint.

Member Fanning, dissented and cited his dissenting opinion in *IBEW*, Local 134 (Illinois Bell Telephone Co.), 192 NLRB No. 17. Member Fanning grounded his dissent upon the legislative history of Section 8(b) (1) (B) of the Act and the type of work performed by the supervisormembers during a lawful economic strike. Member Fanning reasoned that the fines imposed upon supervisormembers were not imposed for their activities related to collective-bargaining or grievance-adjustment functions, "but were imposed because of their violation of an unrelated union rule proscribing members of the union from performing struck work during a strike, . . .". The dissenting member recognized the distinction between a supervisor's function representing his employer for the purpose

<sup>&</sup>lt;sup>2</sup>"P" refers to the Petition For a Writ of Certiorari by the Petitioner, Florida Power & Light Company.

of collective bargaining or grievance adjustment as opposed to a supervisor performing bargaining unit work.

## C. The Decision of the Court of Appeals

The Petitioner, without stating it, has implied that the decision below was by a divided Court and that substantial disagreement existed between three judges joining in the opinion of the Court and two judges concurring in a separate opinion. (See fn. 4 at P-6) No such disagreement existed in the decision below.

The Court found, contrary to the decision of the Board, that Section 8(b) (1) (B) of the Act is not violated when a union disciplines members who happen to be supervisors when these supervisors cross picket lines and perform rank-and-file struck work. The Court emphasized the Board's interpretation of this statute was inconsistent with the statutory language, prior Board precedent, Supreme Court precedent, legislative history and basic principles of fairness.

The concurring opinion was joined in by two (2) members of the Court. The concurring opinion emphasized legislative history and congressional intent behind Section 8(b) (1) (B) of the Act.

Both the opinion of the Court and concurring opinion recognize the right that fines and other sanctions can be imposed upon members of a union who are supervisors and who perform bargaining unit work which threatens the very purpose and effect of an economic strike. Concluding, Respondents submit that the thesis and decision of the majority of the Court below is correct and should be affirmed should the Petitioner's Petition be granted.

## RESPONDENTS' POSITION ON THE WRIT.

The Respondents agree with the Petitioner that there presently exists among the Circuits conflict as to the proper scope and interpretation of Section 8(b) (1) (B) of the Act. The Petitioner has well documented the existing conflict among the Circuits and the importance of the need for uniformity in interpreting an important section of the Act. Respondents feel strongly that the decision of the Court below and the Decision of the Court of Appeals for the Ninth Circuit in National Labor Relations Board v. San Francisco Typographical Union No. 21, International Typographical Union, AFL-CIO, Nos. 71-2949 and 71-2987, decided May 18, 1973, have correctly interpreted the proper scope and application of Section 8(b) (1) (B) of the Act.

The Respondents, in light of the substantial conflict existing among the Circuits, can cite no reason why the Petitioner's Writ should not be granted. Respondents concede that the scope and proper application of Section 8(b)(1)(B) is a very important area of labor law over which the Circuits have disagreed.

Petitioner, at page 10 of the Petition, cites a number of Board decisions which are alleged to support the Decision of the Board below, denied enforcement by the Court. The Petitioner maintains that these Decisions support the Board's position that any imposition of sanctions against a union member-supervisor during a strike violates Section 8(b) (1) (B) of the Act.

The Decisions cited by the Petitioner share a common thread not present in the instant case. Each decision cited by the Petitioner concerns a union's imposition of sanctions against a supervisor who is a member when that supervisor either interpreted and applied an existing collective bargaining agreement consistent with the desires of his employer or adjusted a grievance consistent with the desires of his employer. No case cited by the Petitioner supports the Decision of the Board below, denied enforcement by the Court, that a union violates Section 8(b) (1) (B) of the Act when its fines and/or imposes sanctions against a union member-supervisor when he performs rank-and-file bargaining unit work during an economic strike.

Respectively submitted,

Seymour A. Gopman Attorney for Respondents

<sup>&</sup>lt;sup>3</sup>See the Decisions cited by Petitioner at P-10.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the above and foregoing REPLY TO PETITION FOR A WRIT OF CERTIORARI were served by Airmail, First Class, Postage Prepaid, to the following parties this 19th day of November, 1973.

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Nos. 73-556, 73-795

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

FLORIDA POWER & LIGHT COMPANY, Petitioner

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL., Respondents

NATIONAL LABOR RELATIONS BOARD, Petitioner

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., Bespondents

On Write of Certificati to the United States Court of Appeals for the District of Columbia Circuit

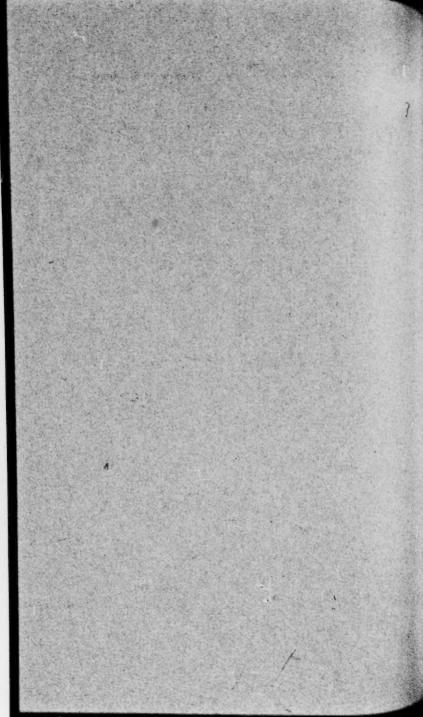
PRIEF FOR THE GRAPHIC ARTS UNION ESC.
PLOYERS OF AMERICA. A DIVISION OF THE
PRINTING INDUSTRIES OF AMERICA, INC.
AS AMICUS CURIAE

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# IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-556, 73-795

FLORIDA POWER & LIGHT COMPANY, Petitioner

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL., Respondents

NATIONAL LABOR RELATIONS BOARD, Petitioner

V.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE GRAPHIC ARTS UNION EM-PLOYERS OF AMERICA, A DIVISION OF THE PRINTING INDUSTRIES OF AMERICA, INC., AS AMICUS CURIAE

This brief on behalf of the Graphic Arts Union Employers of America, a division of Printing Industries of America, Inc., as amicus curiae, is filed pursuant to written consent of the parties under Rule

42(2) of the Court. It is in support of the position of the National Labor Relations Board (herein called the Board) that Section 8(b)(1)(B) of the National Labor Relations Act, as amended (herein called the Act), was violated by the disciplinary actions imposed by the unions involved here against foremen and other supervisors who performed work during a strike, and urges reversal of the decision of the court below which denied enforcement of the Board's orders.

## I. THE INTEREST OF THE AMICUS CURIAE

The Graphic Arts Union Employers of America (GAUEA), a division of Printing Industries of America, Inc., is a national association representing approximately 3,500 printing companies throughout the country. Its membership is comprised of unionized companies in the commercial printing industry, which employ almost 250,000 unionized workers. Although there are some large printing corporations which employ substantial numbers of unionized employees, the industry is characterized by a vast number of small and medium sized companies whose employment ranges from only 3 or 4 employees to 25-50 employees. Over 80 percent of the firms in the industry employ 25 employees or fewer.

Almost all of the companies which are members of GAUEA are affiliated with local trade associations which are subordinate bodies of Printing Industries of America, Inc. Collective bargaining in metropolitan areas is generally conducted on a multi-employer basis through the local association or its union employers division. There are also many collective bargaining agreements negotiated by individual firms which may be located outside of a metropolitan area served by a

local association or which may be within such an area but as a matter of preference desire to negotiate on their own.

Each of the companies which are members of GAUEA negotiates with one or more of the labor unions traditionally associated with the printing industry. These include locals or affiliates of such unions as the International Typographical Union, International Printing Pressmen and Assistants Union, Graphic Arts International Union (which as a result of a merger combines the Lithographers and Photoengravers International Union and International Brotherhood of Bookbinders), and others. Since each of these unions has traditionally been associated with a particular printing craft, it is not at all uncommon for even a small plant to bargain with as many as three or four different unions.

The direct and immediate interest of the amicus herein lies in the fact that it is common in the industry for collective bargaining agreements to require foremen or other supervisors to be union members, though the union may not bargain on their behalf. Even in the absence of such contractual requirements, foremen or other supervisors who have been promoted from bargaining unit status will frequently maintain their union membership. Particularly in recent years, the printing unions have been extremely militant in invoking internal fines or expulsion procedures against foremen and other supervisors who by their interpretations of a labor agreement, their assignments of work, or their own performance of work (including work during a strike), have acted in their employer's interest in a manner adverse to the union's position.

Indeed, a substantial number of the cases in recent years in which unions have been held to have violated Section 8(b)(1)(B) have involved firms in the commercial printing industry or newspapers which, though not part of the commercial printing industry, are subject to labor contracts with the same unions. Several of the cases before the Board and the appellate courts, which have presented the very issue now before this Court of a union's right to fine or expel a supervisor for performing work during a strike, have involved printing unions and commercial printers or newspapers, e.g., N.L.R.B. v. Toledo Locals Nos. 15-P and 272, LPIU, AFL-CIO (Toledo Blade Co.), 437 F.2d 55 (CA 6, 1971); N.L.R.B. v. San Francisco Typographical Union No. 21, ITU, AFL-CIO (California Newspapers, Inc.),-F.2d-, 83 LRRM 2314 (CA 9, 1973); Milwaukee Printing Pressmen & Assistants Union No. 7, IPP & AU (North Shore Publishing Co.), 192 NLRB 914 (1971); Local 261, Lithographers and Photoengravers Union, AFL-CIO (Manhardt-Alexander, Inc.), 195 NLRB 408 (1972).

GAUEA is seriously concerned over the rule pronounced by the court below which would permit unions to exercise control over work performed by management representatives during a strike through the imposition of internal union discipline. The decision of that court, if permitted to stand, would seriously compromise the loyalty expected by employers of their supervisory personnel. Moreover, by effectively depriving the employer of his opportunity to counteract a strike by maintaining production through the use of supervisory personnel, that court's interpretation of the statute would substantially increase the bargaining strength of unions by sacrificing tradi-

tional rights of the employer. The decision of the court below, in the view of GAUEA, is unsound as a matter of statutory interpretation and detrimental as a matter of national labor policy.

### IL SUMMARY OF ARGUMENT

Section 8(b)(1)(B) makes it unlawful for a union to restrain or coerce "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." It has been uniformly accepted by the Labor Board and the courts that that section not only reaches union restraint or coercion designed to force the employer to change such representatives, but also bars such conduct where designed to cause the employer's representative to adopt an attitude more amenable to the union's wishes.

In cases where a supervisor has retained his union membership, either because he is required to do so by the terms of a collective bargaining agreement or for reasons of personal preference, unions have undertaken such restraint or coercion through the device of imposing fines upon the offending supervisor or have expelled him. The vice in such a procedure, as the Board has properly concluded, is that such actions are designed to change the supervisors from "persons representing the viewpoint of management to persons responsive or subservient to [the union's] will." San Francisco-Oakland Mailers' Union No. 18, ITU, 172 NLRB 2173 (1968).

The court below does not take issue with the basic proposition that union restraint or coercion designed to change the attitudes of employer representatives involved in collective bargaining or grievance adjustment constitutes a violation of Section 8(b)(1)(B), or

that union-imposed fines or expulsion can constitute such restraint or coercion. Rather, it has adopted the premise that the fines and expulsions involved here against supervisors who performed what the court characterized as "rank-and-file" work during a strike are not barred by Section 8(b)(1)(B) because the supervisors were not engaged at that time as employer "representatives for the purpose of collective bargaining or the adjustment of grievances."

In our view the court below reached an erroneous result because it both misconstrued the nature of the work of the supervisors and the purposes for which it was performed, and failed to grasp the coercive impact of the union's discipline upon the supervisors in the performance of their duties on behalf of the employer in the future. At bottom, the court took an improperly restrictive view of the employer interests protected by Section 8(b)(1)(B).

Presumably if the court had believed that the performance of work by supervisors during a strike which would ordinarily have been performed by rank-and-file employees was undertaken for "the purposes of collective bargaining," it would have agreed with the Board that the statute had been violated. What it failed to recognize was that just as a strike is "part and parcel of the process of collective bargaining," N.L.R.B. v. Insurance Agents' International Union, AFL-CIO, 361 U.S. 477, 495 (1960), so are employer efforts to diminish the impact of the strike by maintaining production and thereby improving its bargaining position.

The particular tasks that the supervisor happens to perform during a strike are irrelevant, for the concept of "rank-and-file" work has meaning only with respect to the division of labor when both supervisory and non-supervisory personnel are working. salient point is that the supervisor, as a member of the management team upon which management is entitled to rely, is called upon to perform whatever work is expected of him by the employer during a strike with a purpose of enhancing the employer's position in bar-gaining negotiations by dramatizing the minimal impact of a strike upon the employer's business. a very real sense, the supervisor who works during a strike-particularly one who helps maintain production operations—is the counterpart of the employer representative at the bargaining table who underscores the employer's resistance to a union demand by asserting that even a strike will not cause the employer to change his position. The employer representative at the bargaining table has orally communicated the employer's position to the union; the supervisor working during the strike has translated talk into action.

But even if the court below were correct in its view that the work of a supervisor during a strike does not make him the employer's representative for the purposes of collective bargaining, union discipline against such supervisors nonetheless constitutes illegal restraint or coercion in violation of Section 8(b)(1)(B). The Board has correctly recognized that the purpose of that section of the Act is to prevent the union from driving a wedge between the supervisor and his employer which would interfere with the supervisor's effective performance of his duties on behalf of the employer, for the fear of such disciplinary action would tend to inhibit supervisors from vigorously asserting themselves in their employer's

interest. Thus the Board has properly taken the position that "when the underlying dispute is between the employer and the union rather than between the union and the supervisor, then the union is precluded in taking disciplinary action by Section 8(b)(1)(B)," Local 2150, IBEW (Wisconsin Electric Power Co.), 192 NLRB 77, 78 (1971), enf'd, 486 F.2d 602 (CA 7, 1973). The Board's rationale is a sound one, in keeping with the purposes of Section 8(b)(1)(B), and mandates the illegality of the union actions here.

Although the court below professed to find support for its view in this Court's Allis-Chalmers decision, that decision is wholly inapplicable to the case at bar, for the subsection of the Act involved in that proceeding was designed to safeguard interests which are wholly different from those protected by the subsection involved here.

The Allis-Chalmers decision, which upheld the right of a union to fine or expel employee-members who worked during a strike, involved the construction of Section 8(b)(1)(A) of the Act. That section makes it unlawful for a union to restrain or coerce "employees in the exercise of rights guaranteed in Section 7," and thus by its own terms is made inapplicable to supervisors. The rationale underlying the decision in that case was expressed in this Court's statement, 388 U.S. at 181, that "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent."

<sup>&</sup>lt;sup>1</sup> N.L.R.B. v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967).

The role of the supervisor in the statutory scheme. even one who holds union membership, is scarcely to enhance the union's power as "an effective bargaining agent." Indeed, particularly insofar as a strike reflects the polarization of union and management positions, the supervisor's role as a representative of management is to reflect management's opposition to union demands. Accordingly, inasmuch as Section 8 (b)(1)(A) reflects a statutory policy which would permit a degree of restraint or coercion by a union over its membership for the purpose of bargaining more effectively, it can have no bearing upon a competing section of the statute designed to draw the line between a union's effective representation of employees and a union's control over representatives of the employer.

### III. ARGUMENT

- A. UNION DISCIPLINARY ACTION DESIGNED TO INDUCE PRO-UNION POSITIONS ON THE PART OF SUPERVISORY PERSONNEL IS VIOLATIVE OF SECTION 8(b)(1)(B)
- Section 8(b)(1)(B) Bars Union Discipline Against Supervisors Who, by Performing Work During a Strike, Are Engaged as Representatives of the Employer for Purposes of Collective Bargaining

Section 8(b)(1)(B) makes it unlawful for a union to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." This section of the Act has been uniformly and properly construed by the Board and the courts to prevent union disciplinary efforts designed not only to force the removal and replacement of a supervisor whom the union finds offensive, but also bars union efforts to dictate the manner in which the supervisor performs

his duties on behalf of the employer. This rationale was articulated by the Board in San Francisco-Oakland Mailers' Union No. 18, ITU, 172 NLRB 2173 (1968):

"[Union disciplinary actions] were designed to change the [employer's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will . . . .

That Respondent may have sought the substitution of attitudes rather than persons . . . cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them."

As the Court of Appeals for the Seventh Circuit has recognized, N.L.R.B. v. Local 2150, IBEW (Wisconsin Electric Power Company), 486 F.2d 602, 607 (CA 7, 1973), "We agree that an employer's right to select those representatives whom he chooses would be worthless if the Union could accomplish the functional equivalent of restraining or coercing him in that selection by applying pressure upon those whom the employer has already selected so as to compromise their loyalty." That proposition has been approved by the court below not only in the case at bar, but prior cases as well, Dallas Mailers Union, Local 143 v. N.L.R.B., 445 F.2d 730 (1971), Meat Cutters Union Local 81, AMC&BW, AFL-CIO v. N.L.R.B., 458 F.2d 794 (1972).

Consistent with that rationale, unlawful restraint or coercion violative of Section 8(b)(1)(B) has been

found where the union has imposed disciplinary sanctions through fines or expulsion against supervisors for actions within the scope of their supervisory or managerial responsibilities. For the most part, these cases in recent years have involved union efforts to fine or expel supervisors whose interpretations of the collective bargaining agreement, or assignments of work, or performance of work that the union deemed reserved to bargaining unit personnel, were at odds with the union's view. But not all. The court below has recognized, for example, that Section 8(b)(1)(B) bars union discipline against supervisors not only for their role in grievance adjustment or collective bargaining, but also for performance of other duties as a representative. See Meat management Union Local 81, AMC&BW, AFL-CIO v. N.L.R.B.. supra, where it enforced a Board order against a union which disciplined a supervisor for his managerial decision to implement a new Company meat procurement policy. The court below likewise noted its approval of a decision by the Court of Appeals for the Tenth Circuit, N.L.R.B. v. New Mexico District Council of Carpenters, 454 F.2d 1116 (1972), barring union discipline against a supervisor who exhorted employees to vote against a union during an organizing drive, in performance of his collective bargaining function.

In the case at bar, however, the court below has taken an unduly restrictive view of the statutory reference in Section 8(b)(1)(B) to "the purposes of collective bargaining" and hence has concluded erroneously that that section of the Act fails to reach union discipline against supervisors who perform work for their employer during a strike. Its decision

rests primarily on the erroneous premise that the role of a supervisor who performs work during a strike is "totally unrelated" to the collective bargaining process. To the contrary, if a strike called by a union is "part and parcel of the *process* of collective bargaining," as this Court has recognized, then discipline imposed by a union against supervisors who counter the damaging effects of a strike by performing work at the behest of their employer serves to restrain or coerce that employer in the "selection of his representative for the *purposes* of collective bargaining." (Emphasis added.)

Indeed, it is at the time of a strike called by the union that the stakes involved in the collective bargaining process are usually at the highest-for the issues have become vital enough and the positions of the parties sufficiently polarized as to warrant a disruption of production and loss of earnings-and hence the employer's capacity to withstand the strike by continuing production can have enormous impact on the nature of the bargain that will ultimately result. employer's ability to rely upon his representativeshis supervisory force—to maintain production despite the withdrawal to the picket lines of the rank-and-file employees is thus vitally related to the purposes of collective bargaining. If his representatives remain steadfast in their loyalty to him, the employer may well generate sufficient counter-pressures upon the union to moderate the terms of settlement.

To suggest, as the court below did, that supervisors who during a strike perform work ordinarily per-

<sup>&</sup>lt;sup>2</sup> N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 495 (1960).

formed by rank-and-file employees are not acting as management's representatives, misses the basic point that the employer has enlisted the aid of his management team in an effort to enhance his bargaining position. The inference is compelling that the threat of union discipline against a supervisor which would prevent him from coming to the employer's aid must restrain or coerce the employer in the selection of his representatives for the purposes of collective bargaining.

There is no doubt that if the union attempted to dictate, by similar pressures, the employer's selection of a pliable supervisor or industrial relations director as the employer's representative at the bargaining table, a violation of Section 8(b)(1)(B) would be plainly established. The thrust of the objection to such conduct, of course, is that it deprives the employer of a member of his management team-upon whom the employer should be expected to rely—who in the interest of the employer would press for concessions from the union or otherwise persuade the union of the weakness of its case. The supervisor who works during a strike is providing much the same function with precisely the same objective. He serves as the counterpart of the employer's representative at the bargaining table who forcefully tells the union that even a strike over an issue deemed vital to the employer will not bring the employer to its knees. By working, he underscores the point made at the bargaining table.

The emphasis placed by the majority in the court below on the supervisor's performance of supposedly rank-and-file work fails to come to grips with the

realities of a strike. The performance during a strike of work normally performed by non-supervisory employees would seemingly have more of an impact upon bargaining negotiations than work of any other kind in that it would impress upon the union and its membership that their withholding of services has not brought about the anticipated cessation of operations The salient factor, however, is that the concept of rank-and-file work has meaning only in terms of a division of labor where both supervisors and nonsupervisory employees are working, and is meaningless in the event of a strike. What is significant where a strike has occurred is that all work performed by supervisors is in keeping with their position as representatives of management acting in the furtherance of management's interests and management's bargaining position.

# Section 8(b)(1)(B) Bars Union Discipline Against Supervisors Who Are Acting in the Interest of Their Employer

Union discipline of a supervisor is prohibited by Section 8(b)(1)(B) when the underlying dispute is between the employer and the union. The Board has noted that if the right given the employer to "select" his representative is to be protected in meaningful fashion, he must be free "to make and rely upon a selection of representatives from an uncoerced group of such supervisors whose loyalty to him has not been prejudiced . . . "Toledo Locals Nos. 15-P and 272, LPIU (The Toledo Blade Co., Inc.), 175 NLRB 1072 (1969), enf'd, 437 F.2d 55 (CA 6, 1971). The employer's right to the undivided loyalty of his representatives is unlawfully compromised if the union can hold the supervisor hostage by threats of fine or expulsion when he acts in the interest of the employer.

The Board has forcefully stated its position in Local Union No. 2150, IBEW (Wisconsin Electric Power Co.), 192 NLRB 77, 78:

"The intent [of Section 8(b)(1)(B)] is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position easts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective-bargaining and grievance adjustment representative. pose of Section 8(b)(1)(B) is to assure to the employer that its selected collective bargaining representatives will be completely faithful to its This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. Accordingly, we find that Section 8(b)(1)(B) has been violated."

It is this driving of a wedge between the supervisor and his employer through internal union discipline that the section is designed to prevent, for the fear of disciplinary action is likely to impede—indeed is designed to impede—the supervisor's effectiveness then and thereafter in representing the employer's interests. The court below expressed its awareness of this danger in Meat Cutters Union Local 81 AMC&BW, AFL-CIO v. N.L.R.B., supra, 458 F.2d at 799, by observing that if the union's discipline were permitted to stand "there would have been serious doubt thereafter as to whether [the supervisor] could represent the Company in a bona fide manner against the Union in other matters where their interests were adverse."

The Sixth Circuit in N.L.R.B. v. Toledo Locals Nos. 15-P and 272, LPIU, AFL-CIO (Toledo Blade Co., Inc.), 437 F.2d 55, 57 (1971), was equally sensitive to this point, noting that "[t]his conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to the employer would thereby be impaired."

The thrust of these decisions is that the imposition of union discipline against supervisors for actions undertaken in furtherance of management's interests will tend to coerce such supervisors not only with respect to their actions in the immediate dispute but in the performance of their future managerial duties. Hence the rule pronounced by the Board, that union disciplinary action imposed against supervisors is unlawful whenever the dispute can be characterized as a dispute between the employer and the union rather than between the union and its members, is a sound one and is in keeping with the statutory purposes.

It appears that the court below would have held the union's discipline to be unlawful had it believed that the supervisors were engaged in a managerial capacity while performing work during a strike which was ordinarily performed by rank-and-file employees. Indeed, its decision in *Meat Cutters Union Local 81, supra,* would have dictated such a holding. However, it flatly rejected the Board's contention that such work during a strike was in fact managerial in nature, and stated,—F.2d at—, 83 LRRM at 2591, "The dividing line between supervisory and non-supervisory work in the present context is sharply defined and easily understood." Based upon this inaccurate premise, it erroneously concluded that "There is ac-

cordingly no reason to believe that . . . a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties."

To the contrary, there is no reason to believe that the supervisor performing whatever work he can in accordance with his employer's instructions will share the court's view of this "sharply defined and easily understood" line. Nor does the Court of Appeals for the Seventh Circuit, which observed, N.L.R.B. v. Local 2150, IBEW, AFL-CIO (Wisconsin Electric Power Company), 486 F.2d 602, 608, "What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike."

The particular kind of work a supervisor performs during a strike can have no bearing on the legality of union disciplinary action, for all of it is managerial in nature. As the Court of Appeals for the Seventh Circuit pointed out in *N.L.R.B.* v. *Local 2150*, *IBEW*, supra, 486 F.2d at 608:

"Insofar as their effort helps to keep the business going in order to fulfill commitments to customers and to preserve the company's clientele and good name from deterioration, it lies at the very core of the entrepreneurial function . . . . Accordingly, we think supervisors who act in their employer's interests by performing rank-and-file work during a strike are indeed performing a properly managerial function."

Hence union disciplinary action does have a lasting impact in compromising the supervisor's effectiveness

and loyalty as the employer's representative. The court below has improperly and erroneously substituted its judgment for that of the agency entrusted with administration of a basic labor law with respect to inferences of fact within the special competence of the Labor Board. Radio Officers Union v. N.L.R.B., 347 U.S. 17, 48-50 (1954); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488, 490 (1951).

# B. THIS COURT'S RATIONALE IN ALLIS-CHALMERS DOES NOT SUPPORT THE UNION ACTIONS INVOLVED HERE

Although the court below purported to find support for its decision in this Court's ruling in N.L.R.B. v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967), neither this Court's holding nor its rationale of decision lends support to the view of the court below. Allis-Chalmers, of course, involved the construction of Section 8(b)(1)(A) of the Act, and Section 8(b)(1)(B) as here.

Section 8(b)(1)(A) reflects an attempt by Congress to strike a balance between the protection of the rights of *employees* under Section 7—rights which include self-organization, collective bargaining, and other concerted activity, as well as the right to refrain from such activities—and, by its proviso, the safeguarding of the rights of a union to govern its own affairs. This Court, noting that national labor policy was built on the premise that by pooling their economic strength and bargaining through a labor organization employees "have the most effective means of bargaining

<sup>&</sup>lt;sup>3</sup> Section 8(b)(1)(A) makes it unlawful for a union to restrain or coerce "employees in the exercise of the rights guaranteed in Section 7: *Provided*. That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein..."

for improvements in wages, hours and working conditions," stressed that such a policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees," 388 U.S. at 180. (Emphasis supplied.) The result, as this Court noted, is that "the employee may disagree with many of the union decisions but is bound by them."

It is this recognition of the fact that the individual employee has given up rights that in the absence of representation by a union he might otherwise have so that he might obtain the benefits of collective bargaining, that in our view lies at the core of this Court's decision in Allis-Chalmers. The Court, focusing on the union's role as bargaining agent for employees, stated, 388 U.S. at 181, "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent."

Thus, the restraints that a union may be permitted to impose upon its employee-members in cases where such control enhances its capacity to act effectively as their statutory bargaining representative stand on a far different footing than obligations imposed by a union upon supervisor-members who serve the employer's interest. Obviously the union would be an

<sup>&#</sup>x27;The Act expressly provides in Section 2(3) that a supervisor is not an "employee" within the meaning of the Act, and underscores that declaration in Section 14(a), which makes explicit that an employer cannot be compelled to treat supervisors as employees for purposes of collective bargaining. The employer's right to the undivided loyalty of his supervisors was the basis for

even more effective bargaining agent for the employees it represents if it could compel the employer to choose as his representatives at the bargaining table persons who would comply with the union's dictates. But that is precisely the evil that Section 8(b)(1)(B) was designed to prevent. The statutory policy underlying Section 8(b)(1)(A) which permits a degree of restraint or coercion over employee-members in order to enable the union to function more effectively as bargaining agent is matched by the countervailing statutory policy of Section 8(b)(1)(B) which prohibits any degree of restraint or coercion where employer interests are at stake. Hence this Court's rationale of decision in Allis-Chalmers can have no bearing whatsoever here.

What is clear, moreover, is that a union disciplinary rule against members can be enforced only to the extent that it "reflects a legitimate union interest [and] impairs no policy Congress has imbedded in the labor laws," *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 430 (1969). Inasmuch as Sections 2(3), 14(a), and 8(b)(1)(B) are

the incorporation of Section 2(3) and 14(a) into the Act. The rationale of Congress was aptly summed up by Senator Taft, a prime architect of the statute, when he stated:

"It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various in-between steps, but the general conclusion was that they must either be a part of management or a part of the employees . . . .

The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States." 93 Cong. Rec. 3952 (1947), II Legis. Hist. at 1008-1009.

The same considerations underlie Section 8(b)(1)(B) as well.

designed to assure the undivided loyalty of supervisors to their employer—without restraint or coercion from unions—union attempts to impose internal discipline upon supervisory personnel for their efforts during a strike violate national labor policy and cannot be permitted to stand.

### IV. CONCLUSION

For the foregoing reasons, Graphic Arts Union Employers of America respectfully urges this Court to reverse the decision of the court below in both cases and decree enforcement of the Board's orders.

Respectfully submitted,

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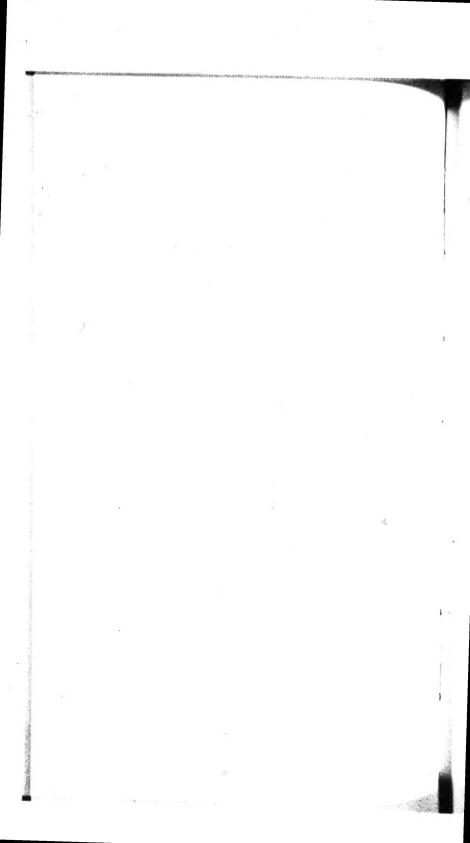
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March 7, 1974



1974

# in the Supreme Countral Bodak, JR. ele of the United States

October Term, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY, Petitioner.

228.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 and 1263.

Respondents.

NATIONAL LABOR RELATIONS BOARD. Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR FLORIDA POWER & LIGHT COMPANY

Ray C. Muller MULLER & MINTZ, P.A. 100 Biscayne Boulevard, North Miami, Florida 33132 Attorney for Petitioner



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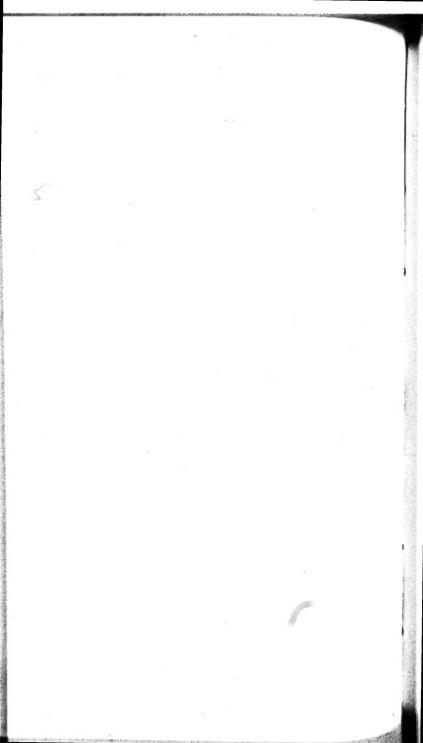
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# in the Supreme Court of the United States

October Term, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY,

Petitioner.

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820 and 1263,

Respondents,

and
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR FLORIDA POWER & LIGHT COMPANY

### OPINIONS BELOW

The opinion of the Court of Appeals, printed in the appendix to the petition for writ of certiorari<sup>1</sup>, pp. 3-75, is reported at 487 F.2d 1143. The findings of fact, conclusions of law, and order of the National Labor Relations Board (A. Cert. 77-102) are reported at 193 NLRB No. 7.

### JURISDICTION

The judgment of the Court of Appeals (A. Cert. 1-2) was entered June 29, 1973. Petition for Writ of Certiorari was filed September 27, 1973, and was granted on January 21, 1974 (A. 80). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

# Sec. 2. When used in this Act -

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor

<sup>&</sup>lt;sup>1</sup>References to opinions printed in the appendix to the petition for writ of certiorari, not re-printed in the Single Appendix hereto, will be designated "A. Cert."

practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

- (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
- Sec. 7. Employees shall have the right to selforganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8. (b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

Section 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

# **QUESTION PRESENTED**

Whether the National Labor Relations Board properly found that a union violated Section 8(b) (1) (B) of the National Labor Relations Act by disciplining mem-

bers, who are Company supervisors, for crossing a picket line and performing Company work during an economic strike against the Company.

## STATEMENT

# A. Stipulated Record<sup>2</sup>

Florida Power & Light Company (hereafter Florida Power or Company) is a public utility furnishing electric power to customers in, broadly, the southern half of the State of Florida (A. 58). Since 1953 (A. 58), a collective bargaining relationship has existed between Florida Power and System Council U-4, representing eleven (11) Local Unions.

On October 22, 1969, the eleven Local Unions representing the Company's production and maintenance employees (A. 53-57) commenced an economic strike against the Company (A. 15). Picket lines were established and maintained at all, or substantially all, Company operational locations (A. 29). During the strike, which continued to December 29, 1969 (A. 29), supervisors who were members of the Respondent Local Unions, crossed the picket lines to perform work as required (A. 42).

<sup>&</sup>lt;sup>2</sup>This matter was considered by the Board on a stipulation by the parties as to facts, issues, and documentary evidence, the parties waiving a hearing before, and decision by, a Trial Examiner. The stipulation appears at (A. 28).

<sup>&</sup>lt;sup>3</sup>The stipulation before the Board provided that "the issue to be decided (by the Board) is whether Respondents' actions set forth in paragraphs number '12' and '13' of the Consolidated Complaint . . . violated Section 8(b)(1)(B) . . . " (A. 28). The action alleged was that supervisors "had crossed Respondents' picket lines and continued to work for Employer" and that sanctions had been imposed against the supervisors for that activity. The Board in its statement of

During January, February, and March, 1970 — after the strike had ended — the Respondent Local Unions commenced internal proceedings against those supervisors who had crossed picket lines and had performed work which, except for the strike, would have been performed by rank-and-file employees (A. Cert. 4; 9, fn. 13; 80-81). Those union-member supervisors who crossed picket lines, but performed no work usually reserved for rank-and-file employees were not made an object of union discipline (A. Cert. 9, fn. 13).

The charges by the Respondent Local Unions alleged that the supervisors had violated provisions of the International Brotherhood of Electrical Workers Constitution (A. 29-37), specifically working in an interest detrimental to, or for a company having difficulty with, the union (A. 76-77); subsections 3, 9, 10, 21 of Article XXVII, International Union Constitution.

Fifty-four (54) (A. 30-37) supervisors were thereafter fined in amounts up to \$6,000.00 and/or expelled from Union membership. Further, by the expulsions, those expelled lost their entitlement to a Union sponsored death benefit fund and eligibility for Union pension benefits (A. 41). All those disciplined were supervisors within the meaning of Section 2(11) of the Act and possessed authority on behalf of the Company to adjust grievances and to act as Company representatives in matters of

facts expanded the issue by finding that "supervisors routinely crossed the picket line during the strike and performed work, including unit work, for the Company" (A. Cert. 80-81). The Court of Appeals limited its consideration to "crossing a picket line and performing rank-and-file struck work during . . . a strike against the company" (A. Cert. 4; 9, fn. 13).

collective bargaining interpretations, although three of them supervised and adjusted grievances of nonbargaining unit employees only (A. 38-39).

# B. The Board's Decision

On the stipulated record, the Board concluded (Member Fanning dissenting) that Respondent Unions had restrained and coerced the Company in the selection of its representatives for collective bargaining and adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act, by imposing fines and other sanctions on those supervisors who had crossed picket lines and performed work, including bargaining unit work, for the Company (A. Cert. 83).

The Board, following its decisions in Wisconsin Electric Power Company, 192 NLRB No. 16, and Illinois Bell Telephone Company, 192 NLRB No. 17, reasoned that "the fines struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances"—its supervisors—"and therefore restrained and coerced employers in their selection of such representatives" (A. Cert. 82).

# C. The Decision of the Court of Appeals

In a 5-to-4 en banc decision, the court of appeals concluded that "(s) ection 8(b) (1) (B) cannot reasonably be read to prohibit discipline of union members — supervisors though they be — for performance of rank-and-file struck work" (A. Cert. 52). The majority opinion rejected the Board's conclusion and held that no violation exists unless the sanctions imposed upon supervisors were

imposed as a result of the supervisors' activity as a Company representative actually engaged in collective bargaining or in the adjustment of grievances (A. Cert. 20-24). The majority believed that "when a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the domain of non-supervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline" (A. Cert. 24-25) and "saying that rank-and-file labor is part of a management function is tantamount to saying that black is white" (A. Cert. 28).

The four-judge dissent rejected the majority view that when a supervisor performs rank-and-file work during a strike, he is doing something unrelated to his supervisory function. Rather, they reason that a supervisor who performs rank-and-file work during a strike is furthering the employer's interest by enhancing its bargaining position during that strike (A. Cert. 61). The dissent believed the majority was unwarranted in reversing the Board's conclusion that union sanctions imposed on supervisors would adversely affect their loyalty to their employers, regardless of the type of work they performed during a strike (A. Cert. 63).

# ARGUMENT

I

The Board Properly Found the Undivided Loyality To Which An Employer Is Entitled Was Impaired By the Union Sanctions, and That Such Sanctions Violated Section 8(b) (1) (B) of the Act.

Following a review of the record, the Board found that Respondent Local Unions, by fining supervisors during the circumstances of a strike, had engaged in conduct violative of Section 8(b) (1) (B) of the Act [29 U.S.C. §158(b) (1) (B)]. The Act, Section 10(e) [29 U.S.C. §160(e)], provides:

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

The determination of the facts and the inferences to be drawn from those facts is for the Board. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Miami Newspaper Pressmen's Local No. 46 v. NLRB, 322 F.2d 405 (C.A. D.C., 1963); NLRB v. Local 369, International Brotherhood of Electrical Workers, AFL-CIO, 341 F.2d 472 (C.A. 6, 1965).

We submit that the Board's findings are based upon substantial evidence in the record as a whole and have "a reasonable basis in the law"; [NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944)].

The Respondent Local Unions have disciplined over fifty individuals — all admittedly supervisors who supervise bargaining unit employees and who represent the Company in matters involving collective bargaining interpretation and adjustment of grievances — for their continued allegiance to their Employer during a strike.

The Board, with court approval, has applied Section 8(b) (1) (B) to a number of situations where union con-

duct tended to subvert the individual loyality an Employer has a right to expect from its supervisors. San Francisco Oakland Mailers' Union No. 18, 172 NLRB No. 252 (1968): New Mexico District Council of Carpenters and Joiners of America, 176 NLRB No. 105 and 177 NLRB No. 76, enforced sub nom, NLRB v. New Mexico District Council of Carpenters and Joiners, 454 F.2d 1116 (C.A. 10. 1972); NLRB v. Toledo Locals, Lithographers and Photoengravers International Union, AFL-CIO, 437 F.2d 55 (C.A. 6, 1971); NLRB v. Sheet Metal Workers International Association, Local Union 49, AFL-CIO, 430 F.2d 1348 (C.A. 10, 1970); Dallas Mailers' Union, Local 142 v. NLRB, 445 F.2d 733 (C.A. D.C., 1971); Meat Cutters Local Union 81 of Amalgamated Meat Cutters of North American, AFL-CIO v. NLRB, 458 F.2d 794 (C.A. D.C., 1972).

The differentiation made by the Court of Appeals and Respondent Local Unions between "supervisors' work" and "rank-and-file work" is a distinction without true substance. Thus, the allegiance required from a supervisor cannot be limited to performance of what is delineated as "usual supervisory functions", particularly in a strike situation. Indeed, supervison is management and is the employer, and must be expected to do all in its power to advance the lawful interests of the employer. ["The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . ." Section 2(2), Labor-Management Relations Act, 1947, as amended, 29 U.S.C. 152(2).]

Management should be — and we submit, is — entitled to the undivided loyalty of its supervisors ("It is natural to expect that unless Congress takes action, management

will be deprived of the undivided loyalty of its foremen."

1 Legislative History of the Labor-Management Relations Act, 411) and certainly that loyalty requires that the supervisors do whatever work is necessary in the best interests of management. That a strike situation may add to their duties, or alter their normal duties performed in behalf of management, cannot alter the protection afforded management by Section 8(b) (1) (B) of the Act.

The Court of Appeals and Respondent Local Unions concede that if supervisory work behind a picket line is confined to "usual supervisory functions", the supervisor is immune from discipline. This distinction, we submit, is founded on neither law nor logic. Thus, those sections of the unions' International Constitution under which the sanctions were imposed (A. 75-76) make no distinction between supervisory work and rank-and-file work. If a union may not fine a supervisor for working behind a picket line when his work is confined to "usual supervisory functions"—as conceded by the Court of Appeals and the unions—then there exists nothing in the unions' Constitution or in the law which would permit the fines here in issue.

To conclude that the lawfulness or unlawfulness of a supervisory fine shall be controlled by the type of work the supervisor may have performed behind a picket line would, we submit, create an unrealistic situation. Thus, a determination of lawfulness would become a matter of degree. Did the supervisor spend one month during a

<sup>4&</sup>quot;When a supervisor acts as such he is a representative of management, and as such, he should be immune from union discipline. The unions participating in the present cases conceded as much as (sic) oral argument when they agreed that when a supervisor crosses a picket line to perform supervisory work he remains immune from discipline." (A. Cert. 24) (Emphasis in original)

three-month strike doing rank-and-file work? Or was it one week, or one day, or one hour? Or did his "usual supervisory functions" include manual labor with a crew, or merely helping out in a plant emergency? We submit that neither law nor logic allows the determination of a violation of Section 8(b)(1)(B) to turn on the kind of work performed by a supervisor.

We submit that the fact the disciplined supervisors did perform bargaining unit work during the strike in no way excuses the restraint and coercion of the Employer proscribed by Section 8(b) (1) (B) of the Act. We further submit that the Board properly found that the Respondent Local Unions' conduct in disciplining supervisors, who adjusted grievances of, and supervised bargaining unit personnel, violated Section 8(b) (1) (B) of the Act.

#### II

Imposition Of Discipline On Company Supervisors Who Supervised Non-Bargaining Unit Personnel and Represented the Company In the Adjustment of Grievances of Such Personnel Violated Section 8(b) (1) (B) of the Act.

The record establishes, and the Board found, that Respondent Local Unions disciplined three Company supervisors, who supervised non-bargaining unit employees. These supervisors represented the Company in the adjustment of grievances of certain non-bargaining unit employees. These supervisors, like their counterparts who supervised bargaining unit employees, were disciplined for their continued allegiance to their Employer during the strike.

We submit there is no legal distinction between supervisors, who adjust grievances of and supervise non-bargaining unit personnel, and their counterparts, who adjust grievances of and supervise bargaining unit personnel. In this regard, the language of the Trial Examiner, adopted by the Board, in *Meat Cutters Local Union 81* 185 NLRB No. 130<sup>5</sup>, is appropriate:

The issue presented requires little added discussion, for the result is controlled by a number of Board decisions, holding, in substance, that a union violates Section 8(b) (1) (B) where it disciplines a member, who has responsibilities as a representative of the employer in administering a collective bargaining agreement or the adjustment of employees' grievances, because he performs duties as a management representative. It is of no moment that the collective bargaining contract makes no express provision for the participation of a supervisor such as Hall in the grievance machinery provided there, for Section 8(b) (1) (B) draws no distinction between a representative for the adjustment of grievances who functions under contractual grievance cedures, and one who does not.

It follows, we submit, that the discipline of nonunit supervisors for performing work in behalf of their Employer is at least as coercive as is the discipline of unit supervisors. New Mexico Carpenters District Council of Carpenters and Joiners of America, 176 NLRB No.

<sup>&</sup>lt;sup>5</sup>Enforced, Meat Cutters Local Union 81, Amalgamated Meat Cutters of North America, AFL-CIO v. NLRB, 458 F.2d 794 (C.A. D.C., 1972).

105 and 177 NLRB No. 76, enf. sub nom, NLRB v. New Mexico District Council of Carpenters and Joiners, 454 F.2d 1116 (C.A. 10, 1972). Thus, if a union may with impunity discipline supervisors wherever it finds them, such action would force the supervisors to adopt only those views and attitudes acceptable to the union throughout the entire Company organization. "Realistically, the Employer will have to replace its foreman or face de facto non-representation by them." San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB No. 252.

We submit the Board properly found that the Respondent Local Unions' conduct in disciplining non-bargaining unit supervisors who adjust grievances violated Section 8(b) (1) (B) of the Act.

## Ш

Respondent Local Unions Improperly Disregarded The Provisions of The Collective Bargaining Agreement Expressly Prohibiting Union Discipline Of Supervisors.

At the time Respondent Local Unions imposed the discipline on Company supervisors, there was in effect a collective bargaining agreement containing a broad prohibition against disciplining supervisors "... for the acts they may have performed as supervisors in the Company's interest."

# "ARTICLE I

4.1 COMPANY FOREMAN RELATIONSHIP

It is agreed that all promotions to and demotions from classifications in the wage bracket of Distribution Dispatcher (FL-WB) and above, as shown in Exhibit 'A', will not be subject to the arbitration The previous collective bargaining agreement contained the identical provisions prohibiting union discipline against Company supervisory personnel (A. 60). Further, the collective bargaining agreement in effect, as well as its predecessor, contained a liberal grievance-arbitration procedure, which, *inter alia*, applies to "... any type of supervisory conduct which unjustly denies to any employee his job or any benefit arising out of his job..."

Notwithstanding the existence of the aforementioned provisions of the collective bargaining agreement. Respondent Local Unions sought to restrain and coerce the Company by imposing union discipline on supervisory personnel. In Meat Cutters Local 81 of Amalgamated Meat

step provided in the Agreement. It is further agreed that employees in such classifications have definite management responsibilities and are direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. • • • (A. 60).

## "ARTICLE IV GRIEVANCES-CONFERENCES-ARBITRATION

26. GRIEVANCES DEFINED

A grievance is hereby defined as a violation of the terms of this Agreement or any type of supervisory conduct which unjustly denies to any employee his job or any benefit arising out of his job . . . "
(A. 50-a)

"27. GRIEVANCE HANDING PROCEDURE

Fourth: Should any matter that has been referred to representatives of the parties, as provided in the third step above, not be satisfactorily adjusted within thirty (30) days from the date of such referral, either party may within sixty (60) days from date of such referral demand arbitration of the matter by giving written notice to the other . . . " (A. 50-b)

"28. ARBITRATION BOARDS - POWERS

(a) . . . the majority decision of the Board of Arbitration shall be final and binding on both parties hereto . . . " (A. 50-c)

Cutters of North America, AFL-CIO v. NLRB, 458 F.2d 794 (C.A. D.C., 1972), that court, under similar circumstances, pointed out that a labor organization, in choosing to ignore contract language and procedures, not only was violating Section 8(b)(1)(B) of the Act, but was also disregarding federal labor policy favoring resolution of union-employer problems through contract procedures.

The collective bargaining agreement expressly prohibited Respondent Local Unions from disciplining Company supervisors through internal union machinery. We submit that the existence of this express prohibition against union discipline vitiates any challenge to the Board's finding that Respondent Local Unions violated Section 8(b) (1) (B) of the Act.

## CONCLUSION

The Company respectfully submits that the Board's findings are based upon substantial evidence in the record as a whole and have a "reasonable basis in law". NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1941).

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

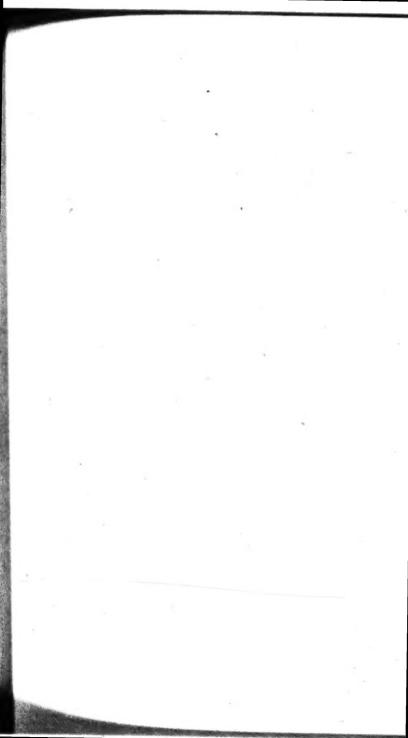
Respectfully submitted,

MULLER & MINTZ, P.A.

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Counsel for Petitioner
Florida Power & Light Company

March, 1974



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# In the Supreme Court of the United States

# OCTOBER TERM, 1973

# No. 73-556

FLORIDA POWER & LIGHT COMPANY, PETITIONER v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL.

# No. 73-795

NATIONAL LABOR RELATIONS BOARD, PETITIONER v.

International Brotherhood of Electrical Workers, AFL-CIO, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CHRCUIT

# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

#### OPINIONS BELOW

The en banc opinion of the court of appeals (Florida Power Pet. App. A, pp. 3-75)<sup>1</sup> is reported at 487

<sup>&</sup>lt;sup>1</sup>The opinion covers two cases which were consolidated for purposes of argument and decision—International Brotherhood of Electrical Workers, AFL-CIO, et al. v. National Labor Rela-

F. 2d 1143. The decisions and orders of the National Labor Relations Board (Florida Power Pet. App. B. pp. 77-102, and A. 162-194) are reported at 193 NLRB 30, and 192 NLRB 85, respectively.

#### JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973 (Florida Power Pet. App. A, pp. 1-2). The petition for a writ of certiorari in No. 73-556 was filed on September 27, 1973, and the petition in No. 73-795 was filed on November 16, 1973. The petitions were granted on January 21, 1974 (A. 80. 81). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are as follows:

Section 2. When used in this Act-

- (3) The term "employee" shall include any employee, \* \* \* but shall not include \* \* \* anv individual employed as a supervisor \*
- (11) The term "supervisor" means any individual having authority, in the interest of the

"Florida Power Pet. App." refers to the Appendix to the petition for certiorari in Florida Power, No. 73-556. "A." refers

to the separate two-volume appendix to the briefs.

tions Board, C.A. No. 71-1559 (hereafter Illinois Bell), and laternational Brotherhood of Electrical Workers, Local 641, et al. v. National Labor Relations Board, et al., C.A. No. 71-1712 (hereafter Florida Power).

employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

# Section 8 \* \* \*

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

# Section 14.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

#### QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members for crossing a picket line and performing rank-and-file work during an economic strike against the employer.<sup>2</sup>

#### STATEMENT

## A. THE BOARD'S DECISIONS

1. "ILLINOIS BELL"

For many years, Local 134, International Brotherhood of Electrical Workers, AFL-CIO ("Local 134") has been recognized by the Illinois Bell Telephone Company ("Illinois Bell") as the bargaining representative, not only for rank-and-file employees, but also for certain supervisors working at its Chicago, Illinois "Plant Department" (A. 163; 202–203). Under the union security clause of the collective bargaining agreement, all members of this bargaining unit—including "P.B.X. Installation Foremen," "Building Cable Foremen," and "General Foremen," "must become and remain members in good standing of Local 134 (A. 163; 118)."

<sup>&</sup>lt;sup>2</sup> The same issue is presented in Local 2150, International Brotherhood of Electrical Workers v. National Labor Relations Board, No. 73–877, California Newspapers, Inc. v. San Francisco Typographical Union No. 21, No. 73–1024, and National Labor Relations Board v. San Francisco Typographical Union No. 21, No. 73–1199, all pending on petitions for certiorari.

<sup>&</sup>lt;sup>3</sup> However, this clause—as it appeared in Article III of the 1966-69 agreement and in all prior agreements going back to 1948—also provided (Article III, Section 3) that an employee will be "deemed a member in good standing so long as he pays or tenders to the Union an amount equal to the regularly recurring monthly Union dues for the remainder of the term of this Agreement \* \* \*" (A. 163, 118).

Since 1959, the wage provisions of the collective bargaining agreements have not covered these supervisors, but the provisions concerning such matters as vacations and overtime work have applied to them (A. 177; 120, 244, 147, 257–258). Other higher ranking supervisors—including those in the positions of District Installation Superintendent, Plant Assignment Foreman, and Test Center Foreman—have not been included in the bargaining unit for any purposes and, accordingly, have received no benefits under the collective bargaining agreement (A. 177; 113, 117, 120–37, 147, 257–258). Illinois Bell, however, has permitted the latter supervisors to maintain their union membership (A. 113, 467, 90, 215). Both the supervisors within the bargain-

#### Promotions

I. All present P.B.X. General Foremen will be promoted to District Installation Superintendents reporting to the District Plant Superintendent in the Plant District to which they are assigned. All present Building Cable General Foremen will be promoted to District Construction Supervisors reporting to the Division Construction Superintendent to whom they are assigned.

(A) As District Installation Superintendents and District Construction Supervisors their wages and conditions of employment will not be a matter of union-management negotiations but they will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and insurance benefits as a result of their membership in the union. However,

In 1954, when the position of District Installation Superintendent was first created, Illinois Bell and Local 134 signed a letter of understanding, apparently still in force, providing (A., 113):

ing unit and those without who have maintained union membership are eligible to participate in the Pension Benefit Fund and Death Benefit Fund established by the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW"), and to be covered under the group life insurance policy carried by Local 134 (A. 113, 264).

All of the aforementioned supervisory personnel are supervisors within the meaning of Section 2(11) of the Act, and they possess the authority to represent management in adjusting grievances (A. 179–180; 233–238, 246–247, 275–276).

Between May 8 and September 20, 1968, Local 134 engaged in an economic strike against Illinois Bell (A. 164; 91, 215). Illinois Bell informed its supervisory personnel that it would like them to work, but that the decision whether to do so would be left to each supervisor. Those who refrained from working would not be penalized (A. 164; 259–260, 265–266, 272). Local 134, however, warned its supervisor members that they would be subject to discipline if they performed rank-and-file work <sup>5</sup> during the strike (A. 164; 267–268, 270).

any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personel.

<sup>&</sup>lt;sup>5</sup> Rank-and-file work is work ordinarily performed by nonsupervisory employees.

During the strike, some supervisors (both within and outside the bargaining unit) crossed the union's picket line and performed rank-and-file work, while others stayed away from the plant (A. 164; 260, 263, 288). After the strike, Local 134 imposed fines of \$500 upon each supervisor-member who had performed rank-and-file work during the strike (A. 165; 97–98, 215, 262). Most of the fined supervisors appealed to the IBEW, which, except where there was procedural irregularity, sustained the fines (A. 165; 91–93, 218).

Upon charges filed by the Bell Supervisors Protective Association (see *supra*, n. 6), the Board (Member Fanning dissenting) held that Local 134 and the IBEW, in so disciplining supervisor-members, violated Section 8(b)(1)(B) of the Act. The Board followed its decision in *Local 2150*, *IBEW* (Wisconsin Electric Power Co.), 192 NLRB 77 (A. 195–201)<sup>7</sup> issued the same day, where it stated (A. 199–200):

During the strike of the Union, the Employer elearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus,

<sup>&</sup>lt;sup>6</sup> Local 134 also imposed fines of \$1,000 upon each of five supervisors who had formed an association (Bell Supervisors Protective Association) to obtain counsel for and otherwise protect those supervisors who worked during the strike (A. 165; 99, 262).

<sup>&</sup>lt;sup>7</sup>This decision was enforced by the Seventh Circuit. National Labor Relations Board v. Local 2150, International Brotherhood of Electrical Workers, 486 F. 2d 602 (Florida Power Pet. App. D, pp. 105-117), pending on petition for certiorari, No. 73-877.

the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.

\* \* \* The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method. union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. \*

The Board ordered the unions, inter alia, to rescind the fines against the supervisors, to expunge all records of the fines, and to reimburse the supervisors for any portions of the fines paid ( $\Lambda$ , 167–168).

# 2. "FLORIDA POWER"

Since 1953, the Florida Power & Light Company ("Florida Power") has had a collective bargaining agreement with certain local unions of the IBEW which negotiate with Florida Power through the locals' association, Systems Council U-4 ° (Florida

<sup>8</sup> System Council U-4 was named as a respondent in the complaint, but the Board dismissed all charges against it and entered its order only against the local unions (Florida Power Pet. App. B, p. 83).

Power Pet. App. B, pp. 79-80; A. 10, 28, 45). The collective bargaining agreement, which does not require union membership, covers some low ranking supervisors. None of the higher ranking supervisors involved in this case, however, was a member of the bargaining unit covered by the agreement (A. 11-14, 28, 46, 53-57, 59, 61a-61d).

Although not in the bargaining unit, the latter supervisors were permitted to maintain membership in the local unions. Many of them did, while a few

<sup>10</sup> These included those in the positions of District Supervisor, Assistant District Supervisor, Assistant Supervisor, Plant Superintendent, Plant Supervisor, Assistant Plant Superintendent, Distribution Assistant, Results Assistant, Assistant Plant Engineer, and Subsection Supervisor (Florida Power Pet. App. A, pp. 6-7).

<sup>11</sup> As the parties stipulated, charges were not filed regarding union discipline of any supervisors within the bargaining unit (A. 41-42). In its brief to the Board, Florida Power requested the Board to amend the complaint so as to include, *inter alia*, the unions' discipline of those unit supervisors. The Board declined to do so, on the ground that such amendment would go beyond the stipulation of the parties (*Florida Power Pet. App. B, p. 81, n. 1*).

<sup>&</sup>lt;sup>9</sup> With respect to supervisors, the collective bargaining agreement provides (A. 47):

<sup>\* \*</sup> It is further agreed that employees in [supervisory] classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification \* \* \*

held honorary withdrawal cards from their respective locals. (A. 39-40). The withdrawal cards entitled the supervisors, so long as they remained in good standing, to rejoin the locals at any time without paying an initiation fee and to apply for IBEW pension benefits (A. 41, 71-74). In addition, the cards entitled them to continue payments to the System Council U-4 Death Benefit Fund; some supervisors availed themselves of this opportunity (A. 16, 28, 39-41, 67).

All of the supervisors involved herein were "supervisors" within the meaning of Section 2(11) of the Act. They were authorized by Florida Power to represent it in matters involving interpretation of the collective bargaining agreement, and to adjust grievances (A. 14–15, 28, 38–39). Three of the supervisors, however, adjusted grievances of only non-bargaining unit personnel (A. 39).

Between October 22 and December 28, 1969, the local unions engaged in an economic strike against Florida Power. Both unit and non-unit supervisors crossed the picket lines and performed work, including some work normally performed by rank-and-file unit employees. (Florida Power Pet. App. B, pp. 79-80; A. 15, 28.) After the strike, five of the local unions disciplined those supervisor-members who had performed rank-and-file work during the strike, fining them in amounts ranging up to \$6,000. Many of them were also expelled from membership in their respective locals and in the System Council U-4 Death Benefit Fund. Those who were expelled lost their good standing with the locals and, accordingly, could not

qualify for IBEW pension benefits. (Florida Power Pet. App. B, p. 81; A. 16, 28, 29-38).

Upon charges filed by Florida Power, the Board (Member Fanning dissenting), relying upon its two prior decisions in *Illinois Bell* and *Wisconsin Electric*, supra, held that the five locals violated Section 8(b) (1)(B) of the Act by discipling supervisors "for performing struck work" (Florida Power Pet. App. B, pp. 82-83). The Board ordered the locals, inter alia, to rescind and refund all fines, to expunge all records of the disciplinary proceedings involving the fined supervisors, and to restore those persons to full membership in the union and the Death Benefit Fund (id. at 85-88).

# B. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in a 5 to 4 en banc decision, <sup>12</sup> concluded that "Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work" (Florida Power, Pet. App. A, p. 52). The majority was of the view that Section 8(b)(1)(B) went no further than to proscribe union attempts to discipline supervisors for the manner in which they performed their management functions, and that there was little likelihood that discipline of supervisors for performing rank-and-file struck work would significantly affect the performance of those functions. The majority reasoned that

<sup>&</sup>lt;sup>12</sup> The *en banc* decision replaced an earlier panel decision in *Illinons Bell*, 81 LRRM 2257 (Florida Power Pet. App. F. pp. 123-179).

"when a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the domain of non-supervisory employees, he is no longer acting as a management representative \* \* \*. [T]he supervisors will not be serving two masters at the same time. They will be serving them at different times" (Florida Power Pet. App. A, pp. 24-25; internal quotation marks omitted).

The dissenters stated, inter alia, that the majority (1) was "unrealistic" in asserting that the supervisors' performance of rank-and-file work during a strike was "totally unrelated" to the collective bargaining process and their responsibilities in it, and (2) was unwarranted in reversing the Board's determination that the unions' imposition of sanctions on the supervisors would adversely affect their loyalty to their employers regardless of the type of work they performed during a strike (Florida Power Pet. App. A, pp. 60-63).

## SUMMARY OF ARGUMENT

T

A. Section 8(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In San Francisco-Oakland Mailers' Union No. 18, 172 NLRB 2173, the Board held that this provision barred not only direct union pressure upon an employer to replace his chosen collective bargaining or grievance

adjustment representative, but also union discipline of a supervisor-member with collective bargaining or grievance adjustment responsibilities for the manner in which he performed those duties. For, such discipline would tend to make the disciplined supervisor "subservient" to the union's will and, hence, less loyal to the employer in any future decisions relating to collective bargaining or grievance adjustment. As a result, the employer would have to replace that supervisor "or face de facto nonrepresentation" by him (id. at 2173). In later cases, the Board extended this principle to cover situations where the union discipline was imposed on a supervisor with grievance adjustment and collective bargaining functions for the manner in which he performed his other lawful supervisory or management functions. The Board's holding in the present cases that Section 8(b)(1)(B) bars union discipline of such a supervisor-member for performing rank-and-file work during a strike constitutes a reasonable and logical extension of the earlier Board decisions.

B. The Board's construction of Section 8(b)(1)(B) harmonizes that provision with the other provisions affecting supervisors which Congress added to the Act in 1947. Believing that supervisors were the arms of management, Congress sought to guarantee employers the undivided loyalty of their supervisors. Accordingly, it enacted not only Section 8(b)(1)(B) but also Section 2(3), which excluded supervisors as defined in Section 2(11) from the protection of the Act.

Where, however, an employer does not require his supervisors to refrain from union membership or activity. Section 14(a) left supervisors free to become or remain union members. Where they are in the union, subjecting them to union discipline for the performance of their supervisory or management functions, tends to create the very conflict-of-loyalty problem which Congress sought to avoid. The Board's conclusion that Section 8(b)(1)(B) proscribes such discipline avoids this impairment of Congress' objective. Neither the legislative history of Section 14(a) nor practical considerations support the view of the court below that Congress merely intended to afford the employer the option of either permitting his supervisors to become or remain union members, or requiring that they forego union membership.

C. The Board's construction of Section 8(b)(1)(B) also accords with the language of that provision. An employer is likely to be "restrained or coerced" in the "selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" if union pressures on the representatives he has selected give him cause to fear that they cannot be relied on to represent his interests faithfully.

Contrary to the view of the court below, an employer might well have cause to fear this outcome even when the action for which his representatives have been disciplined is the performance of rank-and-file work during an economic strike. There is no clear dividing line between such work and other, more usual, supervisory functions. First, maintaining pro-

duction during a strike may be an essential part of management's effort to strengthen its hand at the bargaining table-an effort in which it would naturally expect the assistance of all members of the management team. Second, the question of who is to perform rank-and-file work, and under what conditions, frequently arises in the course of administering collective bargaining agreements. Accordingly, a supervisor who has felt the union's lash for doing rank-andfile work during a strike may be unlikely to isolate that experience, and thus would be hesitant about offending the union, when confronted with future conflicts between the desires of the union and those of the employer.

D. Construing Section 8(b)(1)(B) to bar union discipline of supervisor-members for performing rank-and-file work during a strike constitutes a fair and reasonable accommodation of the interests involved. It protects the employer's interest in being able to rely on the loyalty of the representatives he has selected for the purposes of collective bargaining and grievance adjustment. It protects supervisors from being forced to choose between equally damaging courses of action-on the one hand, respecting their employer's wishes and risking heavy penalties threatened by their union, and, on the other, obeying the union's order not to aid the employer and risking discharge or other adverse action by the employer. Finally, the Board's construction of Section 8(b)(1) (B) does not impair any vital interest of the union. Supervisory personnel have traditionally been allies

of management rather than of unions during strikes, and the union retains the power to discipline its ordinary rank-and-file members.

E. National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, does not undermine the Board's position here. The issue in that case was whether union fines imposed on employee-members for strikebreaking constituted an unfair labor practice under Section 8(b)(1)(A), a provision which protects entirely different interests from those protected by Section 8(b)(1)(B). A union may, of course, enforce against its members "a properly adopted rule which reflects a legitimate union interest, [and] impairs no policy Congress has embedded in the labor laws." Scofield v. National Labor Relations Board, 394 U.S. 423, 430, explaining National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418. Permitting union discipline in the present cases would frustrate the congressional policy of assuring employers the undivided loyalty of their supervisors.

# $\mathbf{II}$

On the record before it in the present cases, the Board properly concluded that the unions violated Section 8(b)(1)(B) of the Act. All of the supervisors involved had collective bargaining or grievance adjustment authority. In *Illinois Bell*, the employer made clear its wish that its supervisors help keep operations going during the strike, although it promised it would take no action against those who declined to work. In *Florida Power*, no such promise

was made. In both cases, the unions heavily penalized those supervisors who aided the employer by performing struck work. Whether the discipline took the form of fines or of expulsion from the union with concommitant loss of pension or other accumulated benefits, the Board was reasonable in concluding that it would be likely to have a deterrent effect with respect to future supervisory decisions on matters where there was a clash of union and management views.

#### ARGUMENT

#### T

THE BOARD PROPERLY CONCLUDED THAT A UNION VIOLATES SECTION 8 (b) (1) (B) OF THE ACT BY DISCIPLINING A SUPERVISOR-MEMBER WHO POSSESSES COLLECTIVE BARGAINING AND GRIEVANCE ADJUSTMENT RESPONSIBILITIES FOR PERFORMING RANK-AND-FILE WORK DURING A STRIKE

#### A. INTRODUCTION

Section 6(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The Board has construed this provision to bar not only direct union pressure upon an employer to replace his chosen collective bargaining or grievance adjustment representative, but also the indirect pressure which results from union discipline of a supervisor with collective bargaining or grievance adjustment responsibilities, who is a union member, for the manner in which he

has performed not only those duties, but also his other lawful functions as a management representative (hereafter "supervisory or management functions")." Moreover, the Board has concluded that the performance during a strike of rank-and-file work is such a function.

We shall now show below (1) that the Board's interpretation of Section 8(b)(1)(B) is the result of an evolutionary process based upon the Board's experience with variant situations; (2) that the interpretation harmonizes Section 8(b)(1)(B) with other provisions of the Act respecting supervisors; and (3) that the interpretation is consistent with the language of Section 8(b)(1)(B). We further show that the Board was reasonable in concluding that a supervisor's performance of rank-and-file work during a strike is a supervisory or management function.

B. THE EVOLUTION OF THE BOARD'S INTERPRETATION OF SECTION 8(b)(1)(B)

Most of the early cases in which the Board found violations of Section 8(b)(1)(B) involved direct union pressure to force the employer either to replace

<sup>&</sup>lt;sup>18</sup> Since the supervisors in the present cases possessed grievance adjustment or collective bargaining responsibilities (infra, pp. 46-48), there is no occasion for the Court to consider whether Section 8(b)(1)(B) would proscribe union discipline of a supervisor who did not actually possess, but potentially could be assigned, those duties. See Newspaper Guild, Eric Newspaper Guild, Local 187 v. National Labor Relations Board, 84 LRRM 2896 (C.A. 3), decided November 30, 1973, remanding 196 NLRB 1121.

<sup>&</sup>lt;sup>14</sup> Cf. Local 761, I.U.E. v. National Labor Relations Board, 366 U.S. 667, 674.

a collective bargaining or grievance adjustment representative whom the union found objectionable, or to hire foremen from the ranks of union members only.15 Thus, in Los Angeles Cloak Joint Board (Helen Rose Co., Inc.), 127 NLRB 1543, the Board held it to be a violation of Section 8(b)(1)(B) for a union to picket a company with the object of forcing it to dismiss its industrial relations consultant.16 In Baltimore Typographical Union No. 12 (Graphic Arts League). 87 NLRB 1215, the Board found a Section 8(b)(1) (B) violation where the union had sought, by threatening strike action, to compel the employer to accede to its demand for a contract clause providing that all composing-room foremen be chosen from among union members only, and that the foremen "continue to be cloaked with broad managerial powers, including the power of adjusting grievances" (id. at 1218).17 It was immaterial, the Board ruled, that the employer "did not affirmatively resist the foreman demands," for a

<sup>&</sup>lt;sup>15</sup> Other cases concerned union pressure on employers to join or resign from multi-employer bargaining associations. See, e.g., General Teamsters Local Union No. 324 (Cascade Employers Ass'n), 127 NLRB 488.

<sup>&</sup>lt;sup>16</sup> See also Local 986, Miscellaneous Warehousemen, Drivers and Helpers (Tak-Trak, Inc.), 145 NLRB 1511; Southern California Pipe Trades District Council No. 16 (Paddock Pools of California, Inc.), 120 NLRB 249.

<sup>&</sup>lt;sup>17</sup> See also Portland Stereotypers and Electrotypers' Union No. 48 (Journal Publishing Co.), 137 NLRB 782, 787; International Typographical Union (Haverhill Gazette Co.), 123 NLRB 806, 827, enforced, 278 F. 2d 6, 11-12 (C.A. 1), affirmed by an equally divided Court, 365 U.S. 705, 707; International Typographical Union (American Newspaper Publishers Ass'n), 86 NLRB 951, 957, enforced, A.N.P.A. v. National Labor Relations Board, 193 F. 2d 782, 805 (C.A. 7).

Section 8(b)(1)(B) violation does not depend on "the actual effect of the coercive tactics in a particular case" (id. at 1218, n. 10).

In San Francisco-Oakland Mailers' Union No. 18. 172 NLRB 2173, decided in 1968, the Board, for the first time, was presented with a less direct form of union coercion of the employer's selection of his representatives for grievance adjustment or collective bargaining purposes. There, three foremen, who were union members, incurred the union's displeasure because they had permitted work to be performed in a manner contrary to the collective agreement as interpreted by the union. The three foremen were summoned to appear before the union's executive committee, and, after they failed to do so, the union fined them. Despite the absence of coercion aimed directly at securing replacement of the foremen, the Board held that the union had violated Section 8(b)(1)(B) of the Act.

We find \* \* \* that Respondent's actions, including the citations, fines, and threats of citation, were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. [Footnote omitted.] That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the Charging Party by indirect rather than direct

means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them. In all the circumstances, therefore, we find that Respondent's acts constitute restraint and coercion of the Charging Party in the selection of its representatives within the meaning of Section 8(b) (1) (B) of the Act. [172 NLRB at 2173.]

The rationale of San Francisco Mailers was applied in Toledo Locals Nos. 15-P and 272, Lithographers & Photoengravers Int'l Union (Toledo Blade Co.), 175 NLRB 1072. There, two supervisors were disciplined by their union for alleged contract violations committed while other employees in the plant, represented by another union, were on strike—i.e., working in less than the minimum crew of four prescribed by the contract, and, in the case of one supervisor, doing nonsupervisory, production work in excess of the amount permitted by the contract. Although the union disciplined the supervisors for acts contrary to the union's interpretation of the contract, the Trial Examiner, whose decision the Board adopted, placed his holding that the discipline violated Section 8(b)(1) (B) on broader ground.

The Board's decision in the San Francisco Mailers case, underscores the apparent import of Section 8(b)(1)(B) as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers. As the Board

held, such discipline by a union, even though the employer may have consented to the compulsory union membership of the supervisor under a union-security clause, is an unwarranted "interference with [the] employer's control over its own representatives," and deprives the employer of the undivided loyalty of the supervisor to which it is entitled. If, therefore, the supervisor has actually been designated as the employer's bargaining or grievance representative (as the Board and the Trial Examiner found in the San Francisco Mailers' case, and I have also found in the present case), the Unions' discipline of the supervisor is unquestionably a restraint upon, and coercion of the employer's continuing its selection of, and reliance upon, the supervisor as its bargaining and grievance representative and an unfair labor practice within the meaning of Section 8(b)(1)(B) of the Act. \* \* \* [175 NLRB at 1080-1081.7

The Sixth Circuit, in sustaining the Board's decision in Toledo Blade, stated:

This conduct of the union could very well be considered as an endeavor to apply pressure on the supervisory employees of the Toledo Blade, and to interfere with the performance of the duties which the employer required them to perform during the strike, and to influence them to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would

thereby be impaired. [National Labor Relations Board v. Toledo Locals Nos. 15-P and 272, 437 F. 2d 55, 57.]

In New Mexico District Council of Carpenters (A. S. Horner, Inc.), 176 NLRB 797 (Horner I), the Board held that Section 8(b)(1)(B) barred union discipline of a supervisor for actions unconnected with either grievance adjustment or contract interpretation. The supervisor (Wilson) was disciplined by the union for hiring non-union carpenters (even though the collective bargaining agreement had no provision obligating the company to hire from a union hiring hall), and for signing a letter sent out by the company president asking the employees to vote against the union in a representation election. The Board, in finding a violation of Section 8(b)(1)(B), reasoned as follows:

By preferring the charges and imposing a fine upon Wilson, Respondents were attempting to force the Company to change its selected representative for the purposes of collective bargaining and the adjustment of grievances from a representative of management's viewpoint to a person subservient to the will of Respondents. The Council itself explained it was fining or bringing charges against Wilson because he placed the Company's interests above those of Respondents. [Union official] Sizemore in his letter to the General Executive Board of the United Brotherhood stated that Superintendent Wilson's loyalty "must be to the Union." It is clear that Respondents preferred charges against and fined Wilson as a means of disciplining him because he placed the interests of the Company above those of Respondents. This was obviously coercion against the Company because it would tend to require the Company to retain as representatives for collective bargaining and adjustment of grievances only individuals who were subservient to Respondents. That the Company and Respondents had no labor agreement does not detract from this finding. Wilson could and did adjust grievances, \* \* \* [176 NLRB at 798.] 18

Similarly, in *Meat Cutters Union Local 81* (Safeway Stores), 185 NLRB 884, the Board found that the union violated Section 8(b)(1)(B) by fining and expelling from membership a supervisor (Hall) because, pursuant to company instructions, he had ordered processed meat from the company's warehouse instead of having the processing performed by store employees. The Board found that the discipline was imposed "not on the ground that Hall violated the [collective bargaining] contract, but that he had 'violated a duly-adopted union policy directed at the

Is In New Mexico District Council of Carpenters (A.S. Horner, Inc.), 177 NLRB 500 (Horner II), involving the same union and the same company, the Board found a violation of Section 8(b)(1)(B) arising from the union's imposition of a fine on a supervisor for taking a job with the company without first securing clearance from the union as its rules required. The Board found that such clearance would not have been forthcoming because the company did not recognize the union, and that the union was "using its internal working rules to boycott an employer" who had no contract with it (id. at 502). The Board's orders in the two Horner cases were enforced by the Tenth Circuit. National Labor Relations Board v. New Mexico District Council of Carpenters, 454 F. 2d 1116.

preservation of bargaining-unit work'" (id. at 887). The District of Columbia Circuit enforced the Board's order, stating:

The Union in the instant case fined and expelled Supervisor Hall in retaliation for his performance of duties indigenous to his position as a management representative. [Footnote omitted.] \* \* \* Had Hall, as supervisor, refused to carry out these orders as directed by his Employer, he certainly would have been subject to Company discipline, and there would have been serious doubt thereafter as to whether he could represent the Company in a bona fide manner against the Union in other matters where their interests were adverse. Under these circumstances, it is obvious that the Union's actions were impermissibly designed "to change [the Company's] representative from one representing the viewpoint of management to a person responsive or subservient to the Union's viewpoint \* \* \* ." N.L.R.B. v. Sheet Metal Workers, Local 49, 430 F. 2d 1348, 1350 (10th Cir. 1970). [Meat Cutters Union Local 81 v. National Labor Relations Board, 458 F. 2d 794, 798-799.] 10

In sum, prior to its decisions in the present cases, the Board had concluded that Section 8(b)(1)(B) proscribed not only direct union pressure on an em-

<sup>18</sup> See also San Francisco Typographical Union No. 21 (California Newspapers), 192 NLRB 523, 525 (union violated Section 8(b)(1)(B) by fining a supervisor for discharging an employee for taking the afternoon off without permission). The Ninth Circuit sustained the Board's ruling, although it declined to sustain its further finding that the union's discipline of supervisors for working during a strike also violated Section 8(b)(1)(B). National Labor Relations Board v. San Francisco Typographical Union No. 21, 486 F. 2d 1347, 1349, pending on petitions for certiorari, Nos. 73–1024 and 73–1199.

ployer to remove a supervisor with grievance adjustment or collective bargaining functions whom the union disfavored, but also the union restraint of an employer which flows from attempting, through union discipline of such supervisors who are union members, to dictate the way in which they would perform their supervisory or management functions.<sup>20</sup> Contrary to the view of the court below (Florida Power, Pet. App. A, pp. 28–29), the Board did not adopt a new policy, but simply applied the interpretation which had evolved in its past cases in concluding, in Illinois Bell and Florida Power, that the union discipline imposed on the supervisors for performing duties which management properly expected of them during a strike violated Section 8(b)(1)(B) of the Act.<sup>21</sup> As we shall

Flowever, in Local 453, Brotherhood of Painters (Syd Gough & Sons, Inc.), 183 NLRB No. 24, 74 LRRM 1539, the Board indicated that its broad interpretation of Section 8(b) (1)(B) did not amount to a per se rule which would proscribe union discipline of a Section 8(b)(1)(B) representative for any reason. In that case, a supervisor-member who was working at a site struck by a sister local was fined by his union for violating its rule which required members to register with a sister local before accepting work at any site within the latter's geographic jurisdiction. The Board dismissed the Section 8(b)(1)(B) complaint, holding that the registration rule existed to facilitate administration of the hiring hall, and was unrelated to any dispute between union and management in which the employer was entitled to rely on the loyalty of his supervisors.

<sup>&</sup>lt;sup>21</sup> In both decisions, the Board relied on its decision in Wisconsin Electric, 192 NLRB 77, which presented the same issue concerning union discipline of supervisors for performing rank-and-file struck work. In Wisconsin Electric, the Board cited the entire line of cases beginning with San Francisco-Oakland Mailers, supra, with special emphasis on Toledo Blade, supra, noting that the principles it was applying to the facts before it were "long-settled and court approved" (192 NLRB at 78, A. 198.)

now show, the Board's decisions in the present cases are consistent not only with its reasoning in San Francisco Mailers and its progeny, but also with the legislative history of Section 8(b)(1)(B).

C. THE BOARD'S INTERPRETATION HARMONIZES SECTION 8(b)(1)(B) WITH OTHER PROVISIONS OF THE ACT RESPECTING SUPERVISORS

The legislative history of Section 8(b)(1)(B), which was added to the Act in 1947, shows Congress' concern with union attempts to compel replacement of over-strict foremen and to force companies into industry-wide bargaining.22 Moreover, in the 1947 amendments to the Act, Congress went beyond Section 8(b) (1)(B) in legislating on the subject of supervisory employees. It also enacted Section 2(3), which excluded supervisors (as defined in Section 2(11)) from the "employee" category—thereby removing supervisors from the protection of the Act; and it enacted Section 14(a), which provides that, while the Act does not prohibit supervisors from becoming or remaining union members, employers are not required to bargain collectively respecting them.23 All of these provisions appeared in the original text of S. 1126 as reported by the Senate Committee on Labor and Public Welfare,24 and S. 1126 with certain amendments

<sup>&</sup>lt;sup>22</sup> See, e.g., S. Rep. No. 105, 80th Cong., 1st Sess. 21, I Legislative History of the Labor-Management Relations Act, 1947 (GPO, 1948) (hereafter Leg. Hist.) 427; 93 Cong. Rec. 3838 (remarks of Senator Taft), II Leg. Hist. 1012; 93 Cong. Rec. 4143 (remarks of Senator Ellender), II Leg. Hist. 1077.

<sup>23</sup> See text of these provisions, supra, pp. 2-3.

<sup>&</sup>lt;sup>24</sup> I Leg. Hist. 102-103, 112, 136. Since all of these provisions, including Section 8(b) (1) (B), were in S. 1126 from the start,

not material here, was the bill finally enacted into law. Accordingly, the Board was reasonable in treating the provisions respecting supervisory employees as reflecting a congressional policy as to supervisors, and in interpreting Section 8(b)(1)(B) so as to accommodate the policy considerations which underlay the other changes which the 1947 Act made with regard to supervisory employees. Cf. Scofield v. National Labor Relations Board, 394 U.S. 423, 428–429.

In legislating on the subject of supervisors, Congress was in large part reacting to this Court's decision in *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, which upheld a Board determination that foremen were "employees" under the Wagner Act, 49 Stat. 449, and constituted an appropriate unit for collective bargaining purposes. Just as the dissenters in *Packard* had viewed foremen as constituting "the arms and legs of management in executing labor policies" (330 U.S. at 496), so those in Congress who favored passage of the 1947 amendments believed, in the words of Senator Taft, that

it is of little relevance that the Case bill, passed in a previous session of Congress and vetoed by President Truman, contained only the antecedents of Sections 2(3) and 14(a) (see Florida Power, Pet. App. A, p. 44, n. 25). As Senator Taft explained, "the Case bill \* \* \* was only a partial approach to the problem" of the injustices created by the Wagner Act. 93 Cong. Rec. 3835, II Leg. Hist. 1006.

<sup>&</sup>lt;sup>25</sup> For references to the *Packard* case, see, e.g., S. Rep. No. 105, 80th Cong., 1st Sess. 4, I Leg. Hist. 410; 93 Cong. Rec. Λ-2252 (remarks of Senator Ball), II Leg. Hist. 1523-1524; 93 Cong. Rec. 4136 (remarks of Senator Ellender), II Leg. Hist. 1064.

"[f]oremen are part of management." Because foremen—and supervisors generally—played such a key role in the dealings between management and its rankand-file employees, it was essential, the Senate Report on S. 1126 stated, that employers be assured of the "undivided loyalty" of their supervisors.<sup>27</sup>

Under the Wagner Act and the Packard decision, employers lacked this assurance. Management was compelled to bargain with its supervisory personnel in labor organizations "composed of or subservient to the unions of the very men they were hired to supervise," 28 and there were no protections against a union's use of its power to subvert the proper exercise of supervisory authority. As a result, the Senate Report noted, in the mines of the Jones & Laughlin Steel Corporation, where the United Mine Workers had organized the supervisory employees: "Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled." 20 As the House Report put it, unionization of supervisors had led to a situation in which the supervisors "are subject to influence and control by the rank and file

<sup>28 93</sup> Cong. Rec. 3836, II Leg. Hist. 1008. See also 93 Cong. Rec. 5014 (remarks of Senator Ball), II Leg. Hist. 1496.

<sup>&</sup>lt;sup>27</sup> S. Rep. No. 105, 80th Cong., 1st Sess. 5, I Leg. Hist. 411.

<sup>28</sup> Id. at 3, I Leg. Hist. 409.

<sup>&</sup>lt;sup>20</sup> Id. at 4, I Leg. Hist. 410, citing the testimony of H. Parker Sharp in Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess., pt. 1, 339.

union, and instead of their bossing the rank and file, the rank and file bosses them." 30

To deal with this problem, Congress excluded true supervisors (those defined in Section 2(11)) from the definition of "employee" (Section 2(3)) and hence from the protection of the Act. This relieved the employer of the obligation, imposed by Packard, to bargain collectively with a union representing his supervisors. It also permitted the employer to insist, on pain of discharge, that his supervisors refrain from union membership or activity, although, absent such employer insistence, Section 14(a) left supervisors free to become or remain union members.

Where supervisors were union members, however, subjecting them to union discipline for the performance of their supervisory or management functions tends, as shown (pp. 18-27), to create the very conflict-of-loyalty problem which Congress sought to avoid."

 <sup>30</sup> H. Rep. No. 245, 80th Cong., 1st Sess. 14, I Leg. Hist. 305.
 31 See National Labor Relations Board v. Budd Mfg. Co.,
 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908.

<sup>&</sup>lt;sup>32</sup> The Board's decision in Nassau & Suffolk Contractor' Ass'n, 118 NLRB 174, cited by the court below (Florida Power, Pet. App. A, p. 43), is not inconsistent with this view. Although the Board there stated that two "master mechanics" with supervisory status owed "allegiance at least as much to the Union as to their employers" (118 NLRB at 182), this was in the context of concluding that the respondent-employer association had not dominated the union merely by permitting the master mechanics to participate actively in union affairs. The Board was not considering whether union discipline of a management representative would tend to create divided loyalty and thus violate Section 8(b)(1)(B). The master mechanics were not management representatives for grievance

The Board's conclusion that Section 8(b)(1)(B) proscribes such discipline effectuates Congress dominant objective of insuring the employer the undivided loyalty of his supervisors.

The court below concluded that the first portion of Section 14(a)-providing that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization"-shows that Congress merely intended to afford the employer the option of either permitting his supervisors to become or remain union members, or requiring that they forego union membership; i.e., "once an employer permits his supervisors to join unions or agrees to engage in collective bargaining with unionized supervisors, he no longer can claim their undivided loyalty in every employer-union dispute except to the extent that the collective bargaining agreement ensures such loyalty" (Florida Power, Pet. App. A, p. 42). But the "first part of [Section 14(a)] was included presumably out of an abundance of caution," for there was "nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization.\*\* H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, I Leg. Hist. 564.33 The remaining part of the provision merely

adjustment or collective bargaining purposes like the supervisors in the present cases. The Board found that they served as "the Union's job stewards" and were "the representatives of the Union and of the Union's members on the job," holding their positions as master mechanics "only with the approval of the Union" (118 NLRB at 185).

<sup>&</sup>lt;sup>33</sup> See also S. Min. Rep. No. 105, pt. 2, 80th Cong., 1st Sess. 39, I Leg. Hist. 501 ("[t]he beguiling statement of principle in

makes "clear that an employer could not be compelled to treat his supervisors like other statutory 'employees', even if they remained in the union' (Florida Power, Pet. App. A, p. 68). In sum, as the dissenting judges below properly concluded: "There is just nothing in the legislative history to indicate that Congress assumed that if an employer permitted his supervisors to remain in the union, he thereby impliedly accepted their dual loyalty" (ibid.).<sup>34</sup>

section 14 that recognizes [the supervisors'] natural right to self-organization \* \* \* is made meaningless by the removal of the legal sanctions that give vitality and substance to that right").

34 That Congress could not have intended to place the employer in this position is confirmed by these considerations: Although the employer has a statutory right to hire only nonunion supervisors, this option has practical limits. The union will generally desire to have supervisors as members and thus will resist any attempt by the employer to restrict supervisors' membership. And even though a union may not lawfully insist that supervisors be members, the matter is a permissible subject for bargaining. Thus, the union can seek to achieve that result by demanding major concessions on wages or other mandatory bargaining items, in exchange for union agreement to nonunion supervisors. Moreover, the cost of management's insistence on nonunion supervisors may be further increased by the need to compensate such personnel for the forfeiture of accumulated union benefits upon termination of union membership (see n. 41, infra), or for forfeiture of the right to return to the bargaining unit with accrued seniority where the union refuses to accord that right to supervisors.

The documents set forth at notes 4 and 9, supra, show that the employers have had no intention of waiving their right to the undivided loyalty of the supervisors whom they permitted to retain union membership.

D. THE BOARD'S INTERPRETATION OF SECTION 8(b)(1)(B) ACCORDS
WITH THE LANGUAGE OF THAT PROVISION

The Board's view that Section 8(b)(1)(B) bars union discipline of a supervisor-member who has collective bargaining or grievance adjustment responsibilities for the performance of any of his lawful supervisory or management duties accords with the language of that provision. The phrase restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" need not be read as referring only to a situation where the union's immediate object is to force a change in the identity of the employer's representative for those matters. It may properly be read as also encompassing situations where the union's action is likely to deprive the employer of the undivided loyalty of the representative whom he has selected for grievancé adjustment or collective bargaining purposes.

Union discipline of supervisory personnel for the performance of supervisory or management functions restrains or coerces an employer "in the selection of his representatives" because it compels an employer to select as supervisors either persons who are not members of the union, or union members who, because of the threat of union discipline, may not give the employer their full loyalty at a time when he needs it most. Thus, to insure that supervisors would not be subject to the divided loyalty which such discipline would create, an employer must either choose persons who are not members of the union, or, if supervisors are promoted from the ranks of the unionized employees, an employer must insist that such persons withdraw from the union. Where circumstances do not permit the employer to insist that supervisors withdraw from union membership, an employer would be required to select or retain supervisors whose loyalty would necessarily be affected by their subjection to union discipline.

As the court below recognized (Florida Power Pet. App. A, p. 18): "Where a supervisor is disciplined for the manner in which he performed his collective bargaining and grievance adjustment functions, the discipline's likely effect is to change the manner in which the supervisor performs those functions in the future. Discipline therefore achieves by indirect means what Section 8(b)(1)(B) clearly was intended to prevent."

Similarly, where a supervisor is disciplined by the union for performing other supervisory or management functions, the likely effect of such discipline is to make him subservient to the union's wishes when he performs those functions in the future. Thus, even if the effect of this discipline did not carry over to the performance of the supervisor's grievance adjustment or collective bargaining functions, the result would be to deprive the employer of the full allegiance of, and control over, a representative he has selected for grievance adjustment or collective bargaining purposes.

For, it would not be practical for the employer to restructure the supervisor's job so as to confine him to the latter functions.

Moreover, the employer could reasonably conclude that such discipline would also tend to make the supervisor responsive to the union's wishes in the performance of his grievance adjustment or collective bargaining functions. For, a supervisor who has once felt the union's lash for performing a supervisory function contrary to the union's wishes is unlikely to make subtle distinctions when the union seeks to interfere in the performance of grievance adjustment or collective bargaining functions; rather, it is more likely that he will only remember that he was disciplined for defying the union, and will seek to avoid a repetition of that punishment by acceding to the union's current demands.<sup>35</sup>

<sup>35</sup> This danger is enhanced by the fact that the line between grievance adjustment or collective bargaining functions and other supervisory functions is not clear-cut. Thus, in Horner I. supra, the disciplined supervisor, inter alia, co-signed a letter urging the employees to vote against the union in an upcoming representation election. The court below, although there was no collective bargaining agreement in existence, stated: "Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpoint on union members" (Florida Power Pet. App. A, pp. 19-20, n. 18). And, explaining Meat Cutters, supra, where the Board found unlawful union discipline of a supervisor-member for violating a union policy with respect to meat procurement, the court stated: "The discipline \* \* \* was not totally unrelated to the performance of grievance settlement functions since by fining the supervisor the union was avoiding and undercutting a clause in the contract that provided that all matters pertaining to the proper application of the agreement shall be handled by certain grievance-arbitration procedures spelled out in the agreement" (id. at 27).

- E. THE BOARD WAS REASONABLE IN CONCLUDING THAT A UNION SHOULD NOT BE PERMITTED TO DISCIPLINE A SUPERVISOR-MEMBEL FOR THE PERFORMANCE OF RANK-AND-FILE WORK DURING A STRIKE
- 1. The performance of rank-and-file work during a strike is a supervisory or management function

The court below concluded that the analysis se forth above (pp. 33-35) cannot be applied where the supervisor is disciplined for performing rank-and-file work during a strike. The court reasoned: "when a supervisor foresakes his supervisory role to do rank and-file work ordinally the domain of nonsupervisory employees, he is no longer acting as a management representative"; the "dividing line between super visory and nonsupervisory work \* \* \* is sharply de fined and easily understood"; there is "accordingly no reason to believe that by being forced to take side with the union in a dispute unrelated to the perform ance of his supervisory functions, and to take side only to the extent of withholding his labor from rank and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties" (Florida Power Pet. App. A, pp. 24-25) This reasoning does not withstand scrutiny.

As the dissenting Judges below observed, the majority opinion reflects an "unrealistic" view of "the role of a strike in the collective bargaining process' (Florida Power Pet. App. A, p. 61) in asserting that a supervisor performing rank-and-file work during strike "is no longer acting as a management representative." This Court has emphasized that "the us of economic pressure by the parties to a labor disput

is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." National Labor Relations Board v. Insurance Agents' International Union, 361 U.S. 477, 495. Just as a union seeks to strengthen its hand at the bargaining table by bringing the company's operations to a costly halt, so management, in order to hold out for the terms it wants, seeks to counter this pressure by keeping operations going. The performance of rankand-file work during the strike by supervisors and other management representatives is a vital part of such a company effort.

As the Seventh Circuit stated in Local 2150, I.B.E.W. (Wisconsin Electric), supra:

What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike. Otherwise, with no employees to supervise, many supervisors would simply have no managerial responsibilities during a strike. But it can hardly be doubted that it is an essential part of the economic warfare involved in a strike for management to muster its resources in an effort to withstand the union's economic. coercion. Equally undisputable, it would seem, is that an employer is not limited to combating a strike only with his pocketbook while the business lies idle. Rather, management has "traditionally" \* \* \* relied upon supervisors, where practicable, to pitch in and perform rank-andfile work in an attempt both to strengthen its

\$ 50

bargaining position and to preserve the enterprise from collapse during an adverse economic repercussion following a strike. Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. \* \* \* [Florida Power, Pet. App. D, pp. 113-114, 486 F. 2d 602, 608.]

Moreover, contrary to the assumption of the court below, the "dividing line between supervisory and nonsupervisory work" is not "sharply defined and easily understood." Many of the day-to-day problems handled by supervisors involve the question of who is to perform rank-and-file work. The collective bargaining agreement may allow supervisors to perform a given maximum percentage of rank-and-file work," or it may establish some leeway for occasions when supervisors are demonstrating work methods to new employees, correcting faulty work, or making emergency repairs." During a strike, supervisory and rank-

<sup>&</sup>lt;sup>36</sup> In *Toledo Blode*, supra, one of the supervisors was disciplined for performing rank-and-file work in excess of the 20 percent maximum allowed by the contract—during a strike called at the plant by another union (175 NLRB at 1074).

<sup>&</sup>lt;sup>37</sup> In San Francisco Mailers, supra, one of the issues was whether the foreman could do journeyman's work after his regular shift under an "emergency repair" provision of the contract (172 NLRB at 2177).

Cf. Sheet Metal Workers Local 49 (General Metal Products, Inc.), 178 NLRB 139, enforced, 430 F. 2d 1348 (C.A. 10) (foreman disciplined for performing, with the help of two higher-ranking supervisors, "journeyman's work"—hoisting—

and-file work is even more apt to be commingled.<sup>35</sup> Hence, if a supervisor has been disciplined by the union for performing rank-and-file work during a strike, the supervisor would be unlikely to segregate that experience when confronted after the strike with other conflicts between the desires of the union and those of the employer.

In any event, the questions whether a supervisor would be likely to differentiate between union discipline imposed for performing rank-and-file struck work and that imposed for the performance of his other functions, and whether the employer could reasonably conclude that he would not, are to be determined by the Board on the basis of its specialized experience. Its determination is not "to be disturbed by a reviewing court merely because in its own opinion it disagrees with the rightness of the Board's judgment" (Florida Power Pet. App. A, p. 62, dissenting opinion). See Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17, 48–49, 51.

before the start of the regular working day; held that the foreman was engaged in "the supervisory act of directing when, where and by whom the hoisting would be done," 430 F. 2d at 1349).

<sup>28</sup> Thus, in San Francisco Typographical Union, supra, the supervisors who were fined performed both supervisory and rank-and-file work (Pet. App. in No. 73–1024, p. 56). Similarly, in Florida Power, some of the supervisors who were disciplined apparently performed both supervisory and rank-and-file work; only those who merely performed their normal supervisory duties were exempt from discipline. (Florida Power Pet. App. A, p. 9, n. 13; Pet. App. B, p. 81).

2. Construing (8)(b)(1)(B) to bar discipline of supervisormembers for performing rank-and-file work during a strike constitutes a fair and reasonable accommodation of the interests involved

The question, then, is not whether supervisors performing rank-and-file work during a strike are acting as management representatives, but whether the Board made a fair and reasonable accommodation of the various interests involved in concluding that management's claim to the loyalties of supervisors who are union members is superior to the claim of the union. We shall show that it did.

As outlined above (pp. 27-32), the legislative history of the 1947 amendments affecting supervisors evinces a congressional purpose to protect the employer's interest in securing and retaining the loyalties of his supervisors. Such protection would, of course, be especially vital during a strike, and Congress so recognized. By insulating the supervisor-member from union discipline for assisting the employer during a strike, the Board's interpretation of Section 8(b)(1)(B) helps assure the employer of the supervisors' undivided loyalty at that time. In sum, as the dissenting Judges below properly concluded (Florida Power Pet. App. A, p. 63):

When a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline equally interferes with the employer's control

<sup>&</sup>lt;sup>39</sup> See H. Rep. No. 245, *supra*, 15–16, I Leg. Hist. 306–307; S. Rep. No. 105, *supra*, 5, I Leg. Hist. 411; 93 Cong. Rec. 4137 (remarks of Senator Ellender), II Leg. Hist. 1065.

over his representative and equally deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties. \* \* \* [Emphasis in original.]

The Board's interpretation also takes into account the legitimate interests of supervisors. Although the protections of the Act are not extended to supervisors as such, it is both unfair and unwise as a matter of policy to force a supervisor, as the court below would, to choose between equally damaging courses of action. To require a supervisor to leave the union to escape union discipline for honoring the employer's wish that he assist the employer during a strike, imposes a heavy penalty on him in terms of loss of union benefits.40 On the other hand, should the supervisor decide to maintain his union ties and stay away from work in obedience to the union's order, he, unlike the ordinary employee who elects to remain out on strike, is subject to discharge by the employer. See Texas Co. v. National Labor Relations Board, 198 F. 2d 540 (C.A.

<sup>40</sup> In the utility, p inting, construction, and other industries where supervisors are selected from the ranks of employee union members and may return to those ranks, union membership is highly valuable to supervisors because they have substantial investments in union pension and welfare plans and death benefits (as was true in the present cases), and, through the union travel card, they have employment protection in the event of economic or seasonal fluctuations. See The Executive Council, ITU, "Facts About the International Typographical Union," 35–38 (1953); Summers, "Disciplinary Procedures of Unions," 4 Ind. and Lab. Rels. Rev. 15, 26–29 (1950).

9). To avoid this onerous choice between displeasing his union and risking substantial penalties, or displeasing his employer and risking discharge, it is likely that rank-and-file employees would be reluctant to accept promotion to supervisory positions, thereby impairing the congressional policy favoring "upward mobility in the labor market," referred to in the concurring opinion below (Florida Power Pet. App. A, p. 57).<sup>41</sup>

To be sure, the strike "is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is

<sup>41</sup> The opinions below suggest (Florida Power Pet. App. A. pp. 49-50, 54) that the employer could mitigate the hardship by agreeing to compensate the supervisors for any benefits which they might lose by resigning from the union. However, many employers may not have pension plans for management personnel, and providing such benefits only for the class of supervisors promoted into management from the bargaining unit would present a formidable problem. See N. Levin. Labor-Management Benefit Funds 239 (1971). Where pension funds for management personnel do exist, it is rare to find arrangements for reciprocity between those funds and the funds for the rank-and-file employees; so it is unlikely that the supervisors could have their benefits transferred from their old fund. Id. The cost to the management fund of compensating for the lost benefits, i.e., of assuming what would amount to the "past service liability" of each of the new supervisors, would be considerable, even if the amount involved could be amortized over a number of years rather than paid in a lump sum. See Dept. of Social Security, AFL-CIO, Pension Plans Under Collective Bargaining (Pub. No. 132) 61-68. Moreover, where, as here, an employee who has been elevated to supervisor may return to rank-and-file status for a while and then move up again (see n. 40, supra), the employee would be reluctant to cut off his union benefits even though the employer has offered attractive substitute benefits.

essential if the union is to be an effective bargaining agent \* \* \*." National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181. However, to deprive the union of the right to discipline strikebreaking supervisor-members does not impair the union's vital interest in maintaining solidarity during a strike to the same extent as would depriving it of the right, recognized in Allis-Chalmers, to discipline defecting employee-members. For, as shown (pp. 36-38), supervisory personnel have not traditionally been picket-lines allies of the rank-and-file; rather, as the Packard dissent noted, "[i]n industrial conflicts they were allied with management" (330 U.S. at 496). Thus, the union's inability to discipline supervisors for crossing the picket line to do rank-and-file work would not deprive it of its traditional support any more than does its inability to discipline company vice-presidents or other officials without union connections who might be called upon by the employer to keep operations going during a strike.

Nor does the Board's position necessarily result in supervisor-members receiving all of the benefits of union membership, without incurring any of its burdens. Thus, in *Florida Power*, the supervisors whose discipline is at issue were not members of the bargaining unit on strike and hence did not receive any enhanced contract benefits as a result of the strike. While many of the supervisors involved in *Illinois Bell* were members of the bargaining unit on strike, they did not receive the full contract benefits which the regular employees received; for, supervisors'

wages were not covered by the bargaining agreement (see supra, p. 5).42

In any event, nonunion employees in a bargaining unit represented by a union are not denied the benefits of any contract negotiated by the union merely because they did not support the strike which gained the contract. Moreover, as shown (supra, pp. 9-10), some of the supervisors were not full-fledged members of the union, but held "withdrawal" cards which merely permitted them to continue their investments in certain benefit plans. Some supervisors who were full-fledged members still could take only a limited role in its affairs.

In sum, balancing the injury to legitimate employer and supervisor interests from permitting the union to discipline supervisor-members for assisting the employer during an economic strike against the injury to legitimate union interests from denying such power to the union, the Board was reasonable in concluding

<sup>&</sup>lt;sup>42</sup> Local 134's attempt at the Board hearing to show that foremen's wages were pegged to the level of craftsmen's wages (A. 278–280) did not bear fruit. Charles Germain, the Company's staff supervisor in charge of wages and working conditions (A. 253), testified that, when a craftsman is first elevated to a foreman's position at the first supervisory level, his pay is increased by a fixed percentage of his current rate as a craftsman, but that subsequent raises and the pay of other previously promoted supervisors are unaffected by any change in craft wages (A. 279–280).

<sup>&</sup>lt;sup>43</sup> See Local 636, United Association of Journeymen v. National Labor Relations Board, 287 F. 2d 354 (C.A.D.C.); National Labor Relations Board v. Employing Bricklayers' Association, 292 F. 2d 627 (C.A. 3); National Labor Relations Board v. International Typographical Union, 452 F. 2d 976, 979-980 (C.A. 10).

that the employer and supervisor interests should prevail. Accordingly, the Board's "balance" is entitled to stand. See National Labor Relations Board v. Truck Drivers Local No. 449, 353 U.S. 87, 96.

A contrary conclusion is not required by Allis-Chalmers, supra. The issue there was whether union fines against employee-members for strikebreaking constituted an unfair labor practice under Section 8 (b)(1)(A) of the Act as a restraint or coercion of those employees in the exercise of their Section 7 right to refrain from concerted activities. Here the question is whether the imposition of discipline against supervisor-members for performing struck work is an unfair labor practice under Section 8(b)(1)(B) as a restraint of the employer in his right to select and retain loval representatives. "Since Sections 8(b)(1) (A) and 8(b)(1)(B) protect different interests, it simply does not follow that discipline which does not amount to restraint or coercion of the employee under the former cannot constitute restraint or coercion of the employer under the latter." Local 2150, IBEW (Wisconsin Electric), supra (Florida Power Pet. App. D, p. 115, 486 F. 2d at 609).

More relevant to the problem here is National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418. The Court there held that the union violated Section 8(b)(1)(A) by disciplining an employee-member for filing an unfair labor practice charge against the union with the Board, without first exhausting his remedies within the union, as required by union rule. The Court held that

the rule was invalid as applied because it impaired the public interest in insuring "unimpeded access to the Board" (id. at 424-425). As the Court later explained. while the Act leaves a union free to enforce against employee-members "a properly adopted rule which reflects a legitimate union interest, [and] impairs no policy Congress has embedded in the labor laws," the union enjoys no right to enforce rules which are "contrary to the plain policy of the Act." Scofield, supra. 394 U.S. at 430. As shown (pp. 27-32), to permit a union to enforce against supervisor-members a rule barring them from performing rank-and-file work during a strike would frustrate the important policy, which Congress has incorporated in the Act, of assuring employers the undivided loyalty of their supervisors.

## II

ON THE FACTS OF THE PRESENT CASES, THE BOARD PROPERLY CONCLUDED THAT THE UNIONS VIOLATED SECTION 8(b)(1)(B) OF THE ACT

A. In both *Illinois Bell* and *Florida Power*, the supervisors benefited by the Board orders were covered by Section 8(b)(1)(B) of the Act, i.e., they were "representatives for the purposes of collective bargaining or the adjustment of grievances." The parties in *Florida Power* stipulated that the supervisors who were disciplined had authority to represent the employer in matters involving interpretation of the collective bargaining agreement and to adjust grievances (*Florida Power Pet. App. B*, p. 81; 14-15, 28, 38-39). In *Illinois Bell*, substantial evidence sup-

ports the Board's finding that the disciplined supervisors possessed grievance handling and contract administration authority.

Most of them held the position of either PBX Installation Foreman (also termed PBX Foreman) or Building Cable Foreman (A. 97-98). Both of these are first-level supervisory positions (A. 223-224), and Article XXVII in the relevant collective bargaining agreement, which sets forth a "Grievance and Conference Procedure," shows that first-level supervisors have the initial responsibility for handling the grievances of employees under them (Λ. 119-120). Moreover, the testimony of Edward Deady, a District Installation Superintendent who had worked as a PBX Foreman before being promoted to his present position, establishes that the practice of Illinois Bell substantially conformed to that contract provision (Λ. 237-238, 246-247)."

Deady further testified that "most grievances never get above the first step" (A. 247), that it was company policy to see that grievances were resolved there if possible, and that union stewards who tried to bypass that step were admonished (A. 248–249). Deady's testimony also shows that these supervisors had contract interpretation responsibilities, such as administering the overtime provisions of the bargaining agree-

<sup>&</sup>quot;Before the Board, the unions contended that the first-level supervisors were not Section 8(b)(1)(B) representatives because, although they did handle grievances, they lacked authority to make the final decision in the case of "serious grievances" (e.g. termination of an employee). Nothing in Section 8(b)(1)(B) or its legislative history warrants that distinction.

ment (A. 233–234, 248, 249). Finally, the record shows that the higher-level supervisors in *Illinois Bell*—District Installation Superintendents and General Foremen—had grievance adjustment or collective bargaining functions (A. 223, 250, 275), although they had less contact with rank-and-file employees than did first level supervisors (A. 245, 249).

B. In both *Illinois Bell* and *Florida Power*, the company, a public utility, sought to keep operations going during an economic strike. In order to do so, it required the assistance of the above-described supervisors to perform work that the striking employees would otherwise have performed. Although the record in *Florida Power* does not reveal whether the company ordered the supervisors to report to work during the strike, it is reasonable to conclude that it expected them to do so. See *Local 2150*, *IBEW (Wisconsin Electric)*, supra (*Florida Power* Pet. App. D, p. 106, n. 3, 486 F. 2d at 603 n. 3).

Moreover, while in *Illinois Bell* management officials told the supervisors that the company would neither require them to work nor penalize them if they failed to do so, it was clear, as one of the disciplined supervisors testified, that the company "would like to have us come back to work" (A. 272). The fact that the company expressed its wish in optional, rather than command, language can be explained

<sup>&</sup>lt;sup>45</sup> The complaint in *Illinois Bell* included three Assistant Staff Supervisors and two Engineers among the disciplined supervisors (A. 97-98), but the Trial Examiner excluded them from his order, after finding that they had neither collective bargaining nor grievance adjustment functions (A. 180, 192).

on the ground that it realized that it could not find replacements for the supervisors if they refused to work and wished to avoid a "no-win" result should the supervisors decide to obey the union. Local 134 enhanced the prospect of such obedience by warning the supervisors that they would be subject to discipline if they performed rank-and-file work during the strike (supra, p. 6.)

In both cases, those supervisors who acceded to the employer's wishes and assisted him in keeping the plant running were subjected to substantial penalties by the unions. In *Illinois Bell*, the discipline took the form of fines of \$500 for each supervisor (supra, p. 7); in *Florida Power*, fines ranging up to \$6,000 were imposed, and many supervisors were expelled from the union (supra, p. 10). The Penalties of this magnitude would be likely to deter the supervisors who incurred them from assisting the employer in future strikes, thereby depriving him of services which he is entitled to expect will be performed by his management rep-

<sup>&</sup>lt;sup>46</sup> In addition, fines of \$1,000 each were imposed on five supervisors for forming the Bell Supervisors Protective Association (supra, p. 7, n. 6).

The supervisors who were expelled lost the right to continue their participation in the System Council U-4 Death Benefit Fund, as well as the "continuous good standing" with the union which is a condition of eligibility for union pension benefits (supra, pp. 10-11).

<sup>48</sup> Although, in *Illinois Bell*, the supervisors who paid the fines were ultimately reimbursed by the company (A. 261-262, 267), they still had to pay them initially, and run the gauntlet of union disciplinary proceedings. At least one supervisor who did not pay the fine was sued therefor in the state court (A. 272-273).

resentatives. Moreover, it is also likely that the discipline would serve as an object lesson to other supervisors and deter them from rendering future strike assistance to the employer. Cf. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 275.

A different conclusion is not required by the observation of the court below (Florida Power, Pet. App. A p. 24) that "[o]ur everyday experience tells us that the result of discipline is normally some degree of hostility toward the person or group imposing the discipline"; and that "[t]his is even clearer when we look at expulsion as a disciplinary measure," for "[t]hose who are expelled are obviously going to be more loyal to the company and less loyal to the union in the future." Even if discipline were to cause the member to dislike the union, it does not follow that the member would be willing to incur a repetition of that, or more severe, discipline by defying the union in the future. With respect to expulsion, the heavy loss of benefits which that penalty causes could well prompt some supervisors who were expelled to seek to regain the favor of the union so that the expulsion could be rescinded. 49 In any event, the expulsion would certainly have a deterrent effect on other supervisors in the future. See Dallas Mailers Union, Local 143 (Dow Jones Co.) 181 NLRB 286, enforced, 445 F. 2d 730 (C.A.D.C.).

Finally, contrary to the court below (Florida Power Pet. App. A, pp. 23-24), the fact that Illinois Bell

<sup>&</sup>lt;sup>49</sup> This motive would have been especially strong in the case of the one supervisor who was suspended from his local union for three years. That suspension was ultimately rescinded on appeal. (A. 32).

promoted some of the supervisors who, under threat of union discipline, refused to cross the picket line does not prove that it believed that the failure to work during the strike did not impair the supervisor's future reliability as a management representative. The promotions took each of the supervisors in question out of a front-line position in which he would have substantial daily contact with rank-and-file members of Local 134. Moreover, even though the company may have had doubts as to reliability of these supervisors, it could still have decided, on balance, to promote them, at least temporarily, to the new positions

<sup>50</sup> Whether conduct constitutes restraint and coercion within the meaning of Section 8(b)(1)(B) is to be determined by the likely effect of that conduct, and not by whether it succeeded in the particular case. See A.N.P.A. v. National Labor Relations Board, 193 F. 2d 782, 796, 805 (C.A. 7).

<sup>31</sup> Three PBX Foremen who obeyed the union's directive were later appointed to the position of General Foreman (A. 277), a position several steps up in the grievance-handling procedure (A. 275–276). Two other supervisors who respected the union's discipline threats and refused to work during the strike were appointed to the position of District Installation Superintendent (A. 288), a position in which the individual spends most of his time in the office and has significantly less contact with rank-and-file employees than do the first-level supervisors (A. 245–246).

The same pattern was followed with respect to the promotion of supervisors who worked during the strike and were disciplined therefor. One such supervisor (Farrell) was transferred to a position outside the jurisdiction of Local 134 (A. 262); another (Howe) was promoted to Assistant Staff Supervisor (A. 263), a position which the Board found entailed no collective bargaining or grievance adjustment functions; and a third (Hawkins) was promoted after the strike from Assistant Staff Supervisor to District Installation Superintendent, and ultimately transferred to a location outside of Local 134's jurisdiction (A. 271-272).

because they possessed special skills not possessed by other personnel currently employed.

In sum, on the facts of the present cases, the Board properly concluded that the unions violated Section 8(b)(1)(B) of the Act by disciplining supervisormembers for performing rank-and-file work during the strikes called by the unions.

## CONCLUSION

The judgment of the court of appeals should be reversed and the cases should be remanded to that court with directions to enforce the Board's orders.

Respectfully submitted.

ROBERT H. BORK, Solicitor General.

Peter G. Nash, General Counsel,

John S. Irving, Deputy General Counsel,

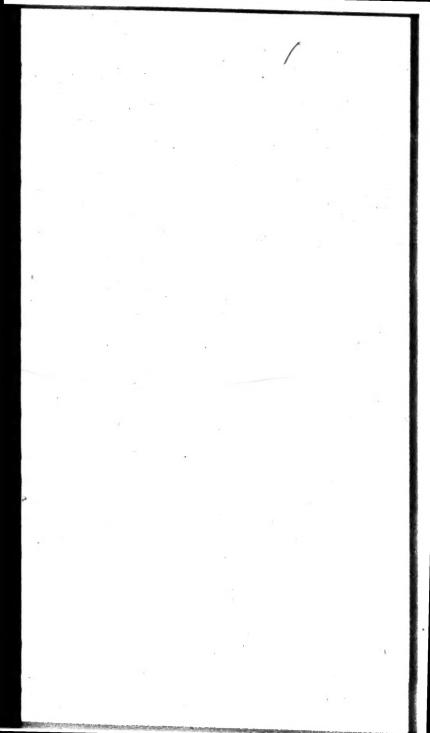
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National Labor Relations Board.

MARCH 1974.



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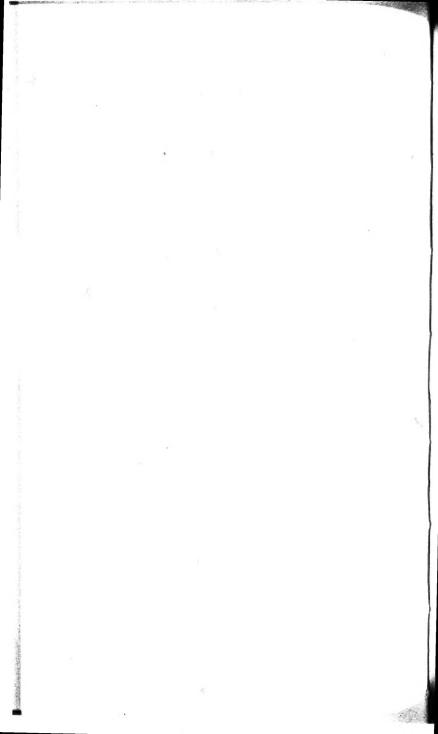
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### IN THE

## Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-556 and 73-795

FLORIDA POWER & LIGHT COMPANY, Petitioner
v.

International Brotherhood of Electrical Workers, Local 641, et al., Respondents

National Labor Relations Board, Petitioner

International Brotherhood of Electrical Workers, AFL-CIO, et al., Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF FOR UNION RESPONDENTS

#### OPINIONS BELOW

The *en banc* opinion of the Court of Appeals in these consolidated cases (FP&L Pet. App. 3-75)<sup>1</sup> is reported at 487 F.2d 1143. The decisions and orders of the Na-

<sup>1&</sup>quot;FP&L Pet. App." refers to the Appendix to the Petition in Florida Power and Light Company, No. 73-556. References to "App." are to the two Volume Appendix to the briefs in this Court.

tional Labor Relations Board (FP&L Pet. App. 77-102; App. 162-194) are reported at 193 NLRB 30 and 192 NLRB 85, respectively.

#### JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973 (FP&L Pet. App. 1-2). The petition for a writ of certiorari in No. 73-556 was filed on September 27, 1973, and the petition in No. 73-795 was filed on November 16, 1973. The petitions were granted on January 21, 1974 (App. 80, 81). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq., hereinafter "the Act") are as follows:

Section 2. When used in this Act—

- (3) The term "employee" shall include any employee, \* \* \* but shall not include \* \* \* any individual employed as a supervisor \* \* \*.
- (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 7. Employees shall have the right to selforganization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

### Section 8 \* \* \*

- (b) It shall be an unfair labor practice for a labor organization or its agents—
- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

### Section 13.

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Section 14.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

#### QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members for crossing a picket line and performing rank-and-file work during an economic strike against the employer.

#### STATEMENT

The Respondent Unions accept the Labor Board's statement of the case, appearing at pp. 4-12 of its brief, and do not restate it here.

## SUMMARY OF ARGUMENT

1

The issue before the Court is whether a union violates Section 8(b)(1)(B) of the Taft-Hartley Act by fining its own members, who are supervisors, solely because they cross the union's lawful picket line during an economic strike against their employer and perform struck work, that is, work performed by rank-and-file employees in the bargaining unit when no strike is in progress. The court below correctly answered that question in the negative, and the Board's position to the contrary is in conflict with the specific language of that section, the pertinent legislative history and

the decision of this Court in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175.

The language of Section 8(b)(1)(B) is clear enough. It is an unfair labor practice for a union or its agents "to restrain or coerce",

"(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

There is nothing in this language which deals with supervisors as such or with union discipline of supervisors, or with the right of employers to utilize supervisors as strikebreakers by performing work performed by rank-and-file employees before the strike.

#### II.

The legislative history of Section 8(b)(1)(B) shows that Congress was aiming at a narrow and specific objective: to end the practice of some unions of attempting to dictate to employers whom they should "select" as their spokesman during collective bargaining and for the adjustment of grievances. See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 21; remarks of Senator Taft, 93 Cong. Rec. 3837. Further, in describing Section 8(b)(1)(B), Senator Taft there observed that "[t]his unfair labor practice referred to is not perhaps of tremendous importance ..." There is no way to square that evaluation with the Board's expansive view that Section 8(b)(1) (B) is a catch-all unfair labor practice provision which protects employers against union discipline of its supervisors for all actions taken at the employer's direction

The Board's interpretation of Section 8(b)(1)(B) is sought to be supported by radiations from Sections 2(3), 2(11) and 14(a) which were adopted at the same time. While these provisions do reflect a congressional policy that "employers be assured of the undivided lovalty of their supervisors" (Board brief, p. 29), the legislative history gives no indication whatsoever that Congress sought to effectuate that policy by creating an unfair labor practice in Section 8(b)(1) (B). On the contrary, all references to that policy are in connection with Sections 2(3), 2(11) and 14(a), which deprive supervisors of the status of "employees" under the Act which they had enjoyed under Board decisions approved in Packard Motor Co. v. NLRB, 330 U.S. 485. Thus, Section 2(3) provides that "supervisors" are excluded from the definition of "employee" for all purposes, and Section 2(11) defines "supervisors". Section 14(a) provides that neither federal nor state law would require employers to treat "supervisors" as "employees."

The separation between Section 8(b)(1)(B) from the sections dealing with the "undivided loyalty" question is revealed also by the fact that the class of supervisors as defined in Section 2(11) differs materially from the class of employee representatives covered by Section 8(b)(1)(B). For, while those who "adjust grievances" fall under both, there are many other persons who meet the definition of "supervisors" in Section 2(11), but who are not within the coverage of Section 8(b)(1)(B), whereas those who represent an employer "for the purposes of collective bargaining" within Section 8(b)(1)(B) are not necessarily supervisors.

The narrow scope intended by Section 8(b)(1)(B) was in fact followed by the Board for more than 20 years, a substantial period of administrative interpretation, which the Board's brief casually characterizes as containing merely "the early cases" under that section. (Board brief at pp. 18-19.). See cases cited at notes 15-17, at p. 19, and accompanying text.) ginning in 1968, however, the Board issued what was to become the progenitor of a new line of cases, expanding the parameters of Section 8(b)(1)(B) and finding a violation of that section where supervisormembers were disciplined by their union for the manner in which they interpeted the collective bargaining agreement, even though the union made no effort to obtain their replacement or to take any other action banned by the specific language of that section. San Francisco-Oakland Mailers Union No. 18, 172 NLRB 2173.

The Board asserts in its brief (at p. 18) that its decisions in the instant cases are the result of an "evolution of Board decisions" beginning with that case. The fact that San Francisco-Oakland Mailers departed so suddenly from two decades of Board interpretation arouses considerable skepticism concerning the Board's newly discovered view of Section 8(b)(1)(B). Federal Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349, 351-352; NLRB v. Drivers' Local Union No. 639, 362 U.S. 274, 290-291. But it is not necessary to disappove the San Francisco-Oakland Mailers doctrine as such. It suffices to show that, as the court below concluded, the decisions herein are not a "logical extension" of that doctrine. Indeed, the instant cases represent a quantum leap from that doctrine and cannot be brought within the ambit of its rationale.

In all of the cases under the San Francsco-Oakland Mailers line, until the Board's companion decisions in Illinois Bell and IBEW Local 2150 (Wisconsin Electric Power Company), 192 NLRB 77, the key to the legality of the union discipline was the nature of the activity for which the supervisor-member was punished In those cases, the discipline was imposed for some action which the supervisor-member took in interpret. ing or applying the collective bargaining agreement, or otherwise acting in some capacity as a management renresentative. But that is not what the Unions in these cases did. They imposed discipline not for interpreting the contract or acting as a spokesman for management in dealings vis-a-vis the union, but for crossing a lawful picket line and performing struck work which would normally be performed by rank-and-file emplovees when there was no strike.

The Board argues, however (brief, pp. 36-39), that when a supervisor performs the work of rank-and-file employees during a strike, he is functioning in a supervisory or representative capacity. But, as the court below stated:

"... saying that rank-and-file labor is part of a management function is tantamount to saying that black is white. Whatever the parameters of *Meat Cutters*' 'management function' test may be, the term 'management function' has no meaning except in contrast to the concept of rank-and-file work. And the Board's reference to management's 'right' to expect supervisors to perform rank-and-file work is nothing but a facade by which the Board hopes to avoid analysis by assuming the answer to the question before it." (FP&L Pet. App. 28.)

The Board's error in expanding the reach of Section 8(b)(1)(B) beyond anything originally contemplated is compounded by the effect of that expansion as a direct—and forbidden—intrusion into the area of regulation of strike weapons. The effect of the Board's decisions in these cases is to ban one of labor's weapons in the course of a strike, i.e., the maintenance of solidarity through the imposition of discipline on its members who engage in strikebreaking. In so doing, the Board has ignored the command of this Court in NLRB v. Insurance Agents' International Union, 361 U.S. 477, 497, that it may not sit "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."

The Board has likewise ignored the statutory command of Section 13 that, "Nothing in this act except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, . . ." See *NLRB* v. *Drivers Local Union No. 639*, 362 U.S. 274, 290, where the Court felt obliged to proceed with caution "against finding in the nonspecific, indeed vague words, 'restrain or coerce' [in Section 8(b)(1)] that Congress intended the broad sweep for which the Board contends."

An additional infirmity in the Board's decisions herein arises from the fact that the supervisor-members in these cases were disciplined for the same conduct that this Court found a proper ground for discipline in *NLRB* v. *Allis-Chalmers Manufacturing Company*, 388 U.S. 175, which, in the words of the court below, "[i]n all relevant respects, \* \* \* is indistinguishable from these cases" (FP&L Pet. App. 30).

The Board's decisions in these cases do not even mention .: llis-Chalmers. This omission is striking for

the further reason that, in its San Francisco-Oakland Mailers decision, supra, which the Board purported to follow in these cases, the Board distinguished Allis-Chalmers on the ground that the union's objective there was to maintain "solidarity in strike action." That, of course, is the situation here also. And it is the preservation of the strike weapon which is at the heart of the Allis-Chalmers decision. See particularly 388 U.S. at 181-182.

#### V.

Although the Board argues that its decisions herein represent a "fair and reasonable accommodation of the interests involved" (Board brief at p. 40), the controlling point is that its "accommodation" is not that intended by Congress. Moreover, the Board emphasizes, in its discussion of the "accommodation" which it has achieved, the "legitimate interests of supervisors" (brief, p. 44), even though acknowledging that Congress deprived them of the protections of the Act (brief, p. 41). Its arguments on behalf of supervisors underscores that the Board's decisions in these cases rest purely on a policy of its own creation rather than that adopted by Congress 27 years ago.

A. It is important to recall that Section 8(b)(1) (B) speaks only in terms of restraint or coercion of "an employer," rather than of "a supervisor". The effect of the Board's decision below is not only to grant a type of Section 7 right to supervisors, which Congress denied them in 1947, but, since it would free them from the normal contractual obligations owed by members to their union, to grant supervisors rights which exceed those of other union members, as held in Allis-Chalmers. In any event, under this Court's holdings in NLRB v. Granite State Joint Board, Textile Workers Union of America, 409 U.S 213, and Booster Lodge 405, In-

ternational Association of Machinists v. NLRB, 412 U.S. 84, supervisor-members can at any time resign their union membership and thereby end their union's power over them.

B. Under the express terms of the statute and the legislative history, the "undivided loyalty" question is simply not a factor under Section 8(b)(1)(B). But even if it were, through Section 14(a) Congress gave employers the option of refusing to allow supervisors to remain union members and thus the right to command their "undivided loyalty". Although neither of the Employers in these cases has availed itself of that opportunity, the Board's decision herein would allow them to achieve that result while retaining the benefits they have gained in bargaining by agreeing to the continued union membership of their supervisors.

C. The Unions' interest here, as in *Allis-Chalmers*, is the fundamental one of "protect[ing] against erosion its status under that [federal labor] policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particually vital when the members engage in strike." (388 U.S. at 181-182.) There is no more indication that Congress intended to abrogate that right with respect to supervisor-members than with respect to employee-members. As one authority has stated:

"If, as the Court said in Allis-Chalmers, the union has a substantial interest in disciplining strike-breakers, that analysis ought not to be altered simply because they happen to be in supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective." (Gould, Some Limitations U pon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers, 1970 Duke Law Journal, 1067, 1129.)

#### ARGUMENT

THE DISCIPLINE OF SUPERVISORS BY A UNION OF WHICH THEY ARE MEMBERS, FOR THEIR PERFORMANCE OF RANK AND FILE WORK IN THE COURSE OF A LAWFUL STRIKE, DOES NOT VIOLATE SECTION 8(b)(1)(B) OF THE ACT.

#### I. INTRODUCTION

The issue before the Court is whether a union violates Section 8(b)(1)(B) of the Act by fining its own members, who are supervisors, solely because they cross the union's lawful picket line during an economic strike against their employer and perform struck work, that is, work performed by rank-and-file employees in the bargaining unit when no strike is in progress. It is respectfully submitted that the court below correctly answered that question in the negative, and that the Board majority's holding to the contrary is in conflict with the specific language of the Act, its legislative history and the decision of this Court in NLRB v. Allis-Chalmers Manufacturing Company, 388 U.S. 175. As shown below, the resolution of this issue turns essentially on a question of statutory construction, rather than on the merits of a new policy developed by a majority of the Labor Board.

Section 8(b)(1)(B) makes it an unfair labor practice for a union to "restrain or coerce... an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In Section II, infra, we show that the legislative history of this section reveals that Congress was aiming at a narrow and specific objective: the ending of the practice of some unions of attempting to dictate to employers whom they should "select" as their spokesman during collective bargaining and the adjustment of grievances. That was the intended scope of Section 8(b)

(1)(B), and that was the effect given to it by the Board for more than twenty years, a substantial period of administrative interpretation which the Board's brief casually characterizes as containing "the early cases" under that section.

Beginning in late 1968, however, the Board issued what was to be the progenitor of a new line of cases, expanding the parameters of Section 8(b)(1)(B) and finding a violation of that section where supervisormembers were disciplined by their union for the manner in which they interpreted the collective bargaining agreement,3 even though the union made no effort to obtain their replacement or to take any other action banned by the specific language of that section. San Francisco-Oakland Mailers Union No. 18, 172 NLRB 2173. The common thread in that line of cases was the Board's finding that the union had violated Section 8(b)(1)(B) because it disciplined a supervisor-member for an action taken in the course of representing his employer in his collective bargaining or grievance adiustment duties, or while acting in some capacity as a management representative vis-a-vis the union or employees.

In the instant case (Illinois Bell), and its companion before the Board, IBEW Local 2150 (Wisconsin Electric Power Company), 192 NLRB 77, however, the

<sup>&</sup>lt;sup>2</sup> Board brief at 18-19. See cases cited at notes 15-17 of Board's brief, at p. 19, and accompanying text.

<sup>&</sup>lt;sup>3</sup> It is, of course, perfectly lawful—and the Board offers no contention to the contrary—for supervisors to be union members and to be included in the same bargaining unit with employees, with the mutual consent of their employer and their bargaining representative. Sakrete of Northern California, Inc. v. NLRB, 332 F.2d 902, 908 (9th Cir. 1964), cert. denied, 379 U.S. 961.

Board went far further in its expansion of Section 8(b)(1)(B) and departed even from the rationale of the previous decisions under San Francisco-Oakland Mailers, which had received judicial approval.4 Illinois Bell and Wisconsin Electric, the supervisormembers were disciplined not for exercising any supervisory function or acting in any manner as a management representative, but solely for performing (as "employees") struck work behind their own union's lawful picket line. Therefore, the discipline in those cases—unlike the earlier cases under San Francisco-Oakland Mailers—was precisely that found permissible in Allis-Chalmers, supra, where this Court held that the discipline of a union member for crossing a picket line does not constitute "restraint" or "coercion" within the meaning of Section 8(b)(1).

II. THE BOARD'S DECISIONS IN THESE CASES, BASED UPON ITS "UNDIVIDED LOYALTY" DOCTRINE, EXCEED THE NARROW SCOPE OF SECTION 8(b)(1)(B) INTENDED BY CONGRESS.

## A. The Language and Legislative History of Section 8(b)(1)(B).

The language of Section 8(b)(1)(B) is clear enough. It is an unfair labor practice for a union or its agents "to restrain or coerce".

"(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;..."

<sup>&</sup>lt;sup>4</sup> See, for example, Toledo Local Nos. 15-P and 272, Lithographers and Photoengravers International Union (Toledo Blade Co.), 175 NLRB 1072, enforced, 437 F.2d 55 (6th Cir.); New Mexico District Council of Carpenters (A. S. Horner, Inc.), 176 NLRB 797 and 177 NLRB 500, enforced, 454 F.2d 1116 (10th Cir.); Sheet Metal Workers Local 49 (General Metal Products Inc.), 178 NLRB 139 enforced, 430 F.2d 1348 (10th Cir.); Dallas Mailers Union Local 143 (Dow Jones Co.), 181 NLRB 286, enforced, 445 F.2d 738 (D.C. Cir.); Meat Cutters Union Local 81 (Safeway Stores), 185 NLRB 884, enforced, 458 F.2d 794 (D.C. Cir.).

There is nothing in this language which deals with supervisors as such, or with union discipline of supervisors, or with the right of employers to utilize supervisors as strikebreakers by performing work which was done by rank-and-file employees before the strike. That Congress did not in express terms prohibit the action of the Unions in these cases is strong evidence that the Board erred in declaring it to be an unfair labor practice. Moreover, the legislative history of Section 8(b) (1)(B) confirms that Congress only intended it to have the narrow scope which its language connotes.

As the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., p. 21): <sup>5</sup>

"... [A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." (Emphasis supplied.)

Similarly, the Senate Minority Report, at page 41, stated that,

"We agree that it should be made an unfair labor practice for a union to interfere with an employer in the designation of his representatives, as provided by section 8(b)(1)." (1 Leg. Hist. 503. Emphasis supplied.)

<sup>&</sup>lt;sup>5</sup>Reported at 1 Legislative History of the Labor Management Relations Act 427 (U.S. Government Printing Office, 1948). Subsequent references to that work will be cited as "Leg. Hist." References herein to "Cong. Rec." are to the daily Congressional Record.

During the Senate debates, Senator Taft described this provision in even more specific terms:

"This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X. we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.' This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, 'we will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No. I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes." (93 Cong. Rec. 3837; 2 Leg. Hist. 1012.)

Senator Ellender spoke of precisely the same problem:

"The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill, in subsection 8(b)(1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of its bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the

union. This amendment seeks to prescribe a remedy in order to prevent such interferences." (93 Cong. Rec. 4143; 2 Leg. Hist. 1077. Emphasis supplied.)

The above references to the legislative history of Section 8(b)(1)(B), which was the subject of little debate and no opposition, make it abundantly clear that Congress was concerned only with protecting an employer's right to choose, free of union coercion, those persons whom he wished to represent him "for the purposes of collective bargaining or the adjustment of grievances." Specifically, Congress sought to ban in Section 8(b)(1) (B) only the right of unions to force employers against their will to be represented for bargaining purposes by national or other employer associations, and to force employers either to accept a representative of the union's choosing or to give up one of their own choice because of the union's objection. And, as we have shown above, neither the language of Section 8(b) (1)(B) nor its legislative history warrants any reading of that section beyond its literal language.

## B. The Language and Legislative History of Sections 2(3), 2(11) and 14(a).

The Board's brief (at pp. 27-32) attempts to support its expansive reading of Section 8(b)(1)(B) by commingling it with amendments to Sections 2(3), 2(11), and 14(a), which were adopted at the same time. It was indeed a congressional policy that "employers be assured of the undivided loyalty of their supervisors" (Board brief, p. 29), but Congress effectuated that policy not by creating an unfair labor practice in Section 8(b)(1)(B), but by establishing that supervisors would not have the status of employees. Section

2(3) provides that "supervisors" are excluded from the definition of "employee" for all purposes, and Section 2(11) defines "supervisors". Section 14(a) provides that neither federal nor state law would require employers to treat supervisors as employees.

The legislative history of Sections 2(3) and 14(a) shows that those provisions were a direct response by Congress to this Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, where the Court upheld the Board's finding that the statutory definition of "employee" included foremen, and that they were therefore entitled to the protections of the Act. The congressional response to the *Packard* decision was swift and complete. Congress accepted the policy arguments that employers should be free to demand the undivided loyalty of their supervisors and specifically excluded supervisors from the definition of employees in Section 2(3). At the same time, and as part of its treatment of the same issue, Congress also enacted Section 14(a):

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as

<sup>&</sup>lt;sup>6</sup> Even though recognizing the policy arguments advanced for excluding foremen from the Act's coverage, the Court made the observation (which has equal significance here) that, "the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms." (Id. at 490.) The Court added:

<sup>&</sup>quot;However we might appraise the force of these arguments as a policy matter, we are not authorized to base decisions of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions." (Id. at 493.)

employees for the purpose of any law, either national or local, relating to collective bargaining."

The net effect of the amended definition of employees in Section 2(3) and the enactment of Section 14(a) was, as the court below correctly concluded, to permit supervisors to continue to organize if they wished but to deprive them of any protection under Section 7 of the Act, and to free employers of any compulsion to bargain with them. Thus, in the words of the House Report:

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: That no one, whether employer or employee need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust." (H. Rep. No. 245 on H.R. 3020, p. 17; 1 Leg. Hist. 308. Emphasis in original.)

## The Senate Report put it this way:

"It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file. As one witness put it, 'Two groups of people working on parallel lines eventually find a parallel interest.'

"In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when

it adopted the Case bill. By drawing a more definite line between management and labor we believe the proposed language has fully met some of the techcriticisms to the corresponding referred to in the President's veto of that bill. It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the Maryland Drydock case (49 N.L.R.B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." (S. Rep. No. 105 on S. 1126, p. 5; 1 Leg. Hist. 411. Emphasis supplied.)

## Further:

"It will be noted, however, that this amendment [excluding supervisors from definition of employees] does not mean that employers cannot still bargain with such supervisors and include them, if they see fit, in collective-bargaining contracts. All that the proposal does is to prevent employers being compelled to accord supervisors the anomalous status of employees for purposes of the Wagner Act." (Id. at p. 19; 1 Leg. Hist. 425. Emphasis supplied.)

Finally, dealing specifically with Section 14, the Senate Report stated as follows:

"Section 14: This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or

<sup>&</sup>lt;sup>7</sup> See also 93 Cong. Rec. 3836, 2 Leg. Hist. 1008-1009 (Sen. Taft).

State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity." (*Id.* at p. 28; 1 Leg. Hist. 434.)

Congress thus preserved the foreman's right to organize. The specific means afforded to employers to command the undivided loyalties of their supervisors was their option to decline to bargain with them collectively and to prohibit them from joining unions. As the Senate Report quoted above stated, employers were freed "from any compulsion" to treat foremen as employees. (S. Rep., supra, at pp. 5, 19; 1 Leg. Hist. 411, 425.) Senator Ball analyzed the situation in the same manner:

"Another provision removes bona fide foremen from the definition of employees in the National Labor Relations Act, thereby removing the compulsion on the employer of bargaining with a union of foremen."

On its review of this legislative history, the court below drew the following lesson from the amendment of Section 2(3) and the enactment of Section 14(a):

"[B]y expressly providing that foremen could unionize, and by indicating that employers who so desired could continue to bargain collectively with supervisors, Congress effectively gave employers an option. Those who wished to do so could continue to hire union members as supervisors and could continue to engage in collective bargaining with supervisors, resolving whatever conflict of loyalties problems arose through the traditional

 $<sup>^8</sup>$  Extension of remarks of Senator Ball, Cong. Rec., May 13, 1947, A 2377 ; 2 Leg. Hist. 1523.

give-and-take of collective bargaining approved in Jones & Laughlin Steel Corp., supra, to arrive at contract clauses dealing with the problem. \* \* \* On the other hand, those employers who wanted to settle the conflict of loyalties problem once and for all would be within their rights in refusing to hire union members as supervisors and refusing to engage in collective bargaining with supervisors." (FP & L Pet. App., 40-41.)

This understanding was shared by the Board itself in its brief to this Court earlier this Term in *Beasley* v. *Food Fair of North Carolina*, *Inc.*, No. 72-1497, p. 6.

"These amendments [2(3), 2(11) and 14(a)] were designed to provide a solution to the conflict-of-loyalty problem created by the unionization of supervisors. Supervisors were free to join unions and to bargain through them if the employer was willing; on the other hand, the employer could insist that his supervisors not join unions and discharge them if they did."

The "amendments" added in 1947 to provide the "solution to the conflict of loyalty problem", cited by the Board, are Sections 2(3), 2(11) and 14(a) (see *id.* at pp. 5-6), but not Section 8(b)(1)(B). (See also *id.* at pp. 6-7, quoting from the legislative history of 2(3), 2(11) and 14(a).) And even in its brief in the present case, the Board finds the "undivided loyalty" policy, on which its whole argument is based, exclusively in that portion of the Senate Report which

<sup>&</sup>lt;sup>9</sup> In the words of one commentator shortly after passage of Taft-Hartley, "the result is that the collective bargaining position of foremen] is to be determined by the parties themselves, not by law. This restores the situation to the status quo ante the original NLRA." Smith, The Taft-Hartley Act and State Jurisdiction Over Labor Relations, 46 Mich. L. Rev. 593, 600 (1948).

explains the provisions of the Senate bill that placed supervisors outside the definition of employee, thereby overruling Packard Motor Company—and returning to the Board's prior Maryland Dry Dock rule. (See Board brief, p. 29, text and note, at n. 27.)

## C. The Demarcation Between Section 8(b)(1)(B) and the Sections Dealing with Supervisory Conflict of Loyalty.

As we have shown, Section 8(b)(1)(B) was addressed to a separate and far more limited question than the conflict-of-loyalty problem which was dealt with in Sections 2(3), 2(11) and 14(a). The separation is further evidenced first, by their lack of relationship in their respective development in the legislative process and, second, by the differences in their language.

Sections 2(3) and 14(a) were descendants of provisions in the Case Bill which was passed by the Congress in 1946 and vetoed by President Truman (H.R. 4908, 79th Cong., 2nd Sess., 1946). As enacted in 1947, they were nothing more than an attempt to reenact, with minor differences not pertinent here, the similar provisions of the Case bill. No provision bearing any resemblance whatever to Section 8(b)(1)(B) was contained in the Case bill, however. Rather, that provision first breathed life in S. 1126, as reported by the Senate Committee on Labor and Public Welfare, 1 Leg. Hist. 112.

Second, the distinctness of Section 8(b)(1)(B) from Sections 2(3) and 14(a) is also shown by their disparity in coverage. Section 8(b)(1)(B) refers only to those persons who represent the employer "for the

<sup>&</sup>lt;sup>10</sup> See S. Rep. No. 105, p. 5, 1 Leg. Hist. 411, quoted at pp. 19-20, supra.

purposes of collective bargaining or the adjustment of grievances." The class of supervisors excluded from the definition of employees in Section 2(3) is, however, defined in Section 2(11) as applying to all individuals,

"... having authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, ..."

There is some overlap between the class of "supervisors" as defined in Section 2(11) and the class of "representatives" encompassed by Section 8(b)(1) (B): Those who have authority to adjust grievances on behalf of employers fit into both categories. But some individuals who are "supervisors" are not "representatives," because, while they have one or more elements of supervisory authority set forth in disjunctive terms in 2(11), they lack the power to adjust grievances. On the other hand the employer's "representatives for purposes of collective bargaining" (e.g., a multi-employer association, or an attorney who negotiates on an employer's behalf) are 8(b)(1)(B) "representatives" but not Section 2(11) "supervisors".

The correct lesson to be drawn from the contrasting scopes of these sections is that of the court below:

"Since the scope of Section 8(b)(1)(B) is narrower than that of the supervisor exclusion in Section 2(3), the Board's approach achieves the anomalous result of having certain supervisormembers—those coming within the definitions of both Sections 2(3) and 8(b)(1)(B)—immune

from all union discipline where there is a dispute between the union and the employer, while other supervisor members—those coming within the definition of Section 2(3) but falling outside the definition of Section 8(b)(1)(B)—remain subject to union discipline. Such a dichotomy is awkward on its face, and makes no sense if one accepts the Board's assumption that under Section 14(a) a supervisor owes his undivided loyalty to his employer not only when his employer exercises his right to refuse to hire union members as supervisors, but also where the employer permits supervisors to join unions." (Pet. App. 44-45.) 11

Finally, it is worth recalling Senator Taft's observation, in describing the nature of Section 8(b)(1)(B), that "[t]his unfair labor practice referred to is not perhaps of tremendous importance, . . ." (2 Leg. Hist. 1012.) 12 There is no way to square that evaluation with the far-reaching scope imputed to Section 8(b)(1)(B) by the Board.

<sup>11</sup> The validity of this point has also been noted by several recent comments: Note, Union Discipline of Supervisors: Illinois Bell Telephone Co., 14 Wm. & Mary L. Rev. 674, 700-701 (1973); Note, Union Discipline of Supervisors Who Are Union Members for Performing Rank-and-File Struck Work Is Not an Unfair Labor Practice, 87 Harv. L. Rev. 458, 467, at n 65 (1973).

<sup>12</sup> This Court has frequently regarded Senator Taft's statements in the course of the debates to be authoritative in interpreting the 1947 amendments. See, e.g., Bus Employees v. Wisconsin Board, 340 U.S. 383, 395, n. 21; NLRB v. Drivers' Local Union No. 639, 362 U.S. 274, 287-288; Teamsters Local 20 v. Morton, 377 U.S. 252, 260, n. 16; NLRB v. Allis Chalmers, 388 U.S. 175, 185-190; Pipefitters v. United States, 407 U.S. 385, 408-409.

#### D. Summary

In sum, the language of the statute leaves no room for the Board's expansive view that Section 8(b)(1) (B) is a catch-all unfair labor practice provision which protects employers against union discipline of their supervisors for actions taken at the employer's direction. Rather, its specific terms show that it deals only with protecting the employer's choice of his representatives for bargaining and grievance adjustment. This view is confirmed not only by the legislative history of Section 8(b)(1)(B), which shows that that section means precisely what it says, but by that of other sections of the Act in which Congress did confront and deal with the problem of supervisors' conflicting loyalty. Thus, the Board's decisions in these cases are totally lacking in support from the explicit language of the Section 8(b)(1)(B) and the appropriate legislative history. Perhaps in tacit recognition of that fact, the Board begins its defense of the decisions herein by asserting that they are justified as the result of an "evolution" of a new line of Board decisions since 1968. We show next that that assertion is similarly lacking in merit.

# III. THE DECISIONS HEREIN CANNOT BE JUSTIFIED AS "THE RESULT OF AN EVOLUTIONARY PROCESS" OF BOARD DECISIONS.

As previously noted, the Board's expansive view of Section 8(b)(1)(B) originated in 1968 in the San Francisco-Oakland Mailers case, supra, 172 NLRB 2173, and it now asserts that its decisions herein are the result of an "evolution of Board decisions" beginning with that case (Board brief, p. 18). We note at the outset that the Board decisions during the first 20 years of its administration of the Taft-Hartley Amend-

ments are fully consonant with the view of the statute which we have set forth above, a factor which alone should arouse skepticism as to the Board's newly discovered approach to Section 8(b)(1)(B), and weighs heavily against its expanded reading of that section. As this Court stated in *Federal Trade Commission* v. Bunte Brothers, Inc., 312 U.S. 349, 351-352:

"That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294." (Emphasis supplied.)

See also *NLRB* v. *Drivers' Local No. 639*, 362 U.S. 274, 290-291, where this Court said, "We think [the Board's earlier cases] gave a sounder construction to §8(b)(1)(A) than the Board's construction in the present case." (*Id.* at 291.) So, too, the Board's earlier cases "gave a sounder construction" to Section 8(b)(1)(B) than do its decisions beginning with *San Francisco-Oakland Mailers*, and particularly in the present cases.

<sup>&</sup>lt;sup>13</sup> This is acknowledged at pp. 18-19 of the Board's brief, as is the fact that San Francisco-Oakland Mailers moved away from that narrow view "for the first time" (Board brief, p. 20).

Nevertheless, it is not necessary to disapprove the San Francisco-Oakland Mailers doctrine as such. It suffices to show that, as the court below concluded, the decisions herein are not a "logical extension" of that doctrine. Indeed, the instant cases represent a quantum leap from that doctrine and cannot be brought within the ambit of its rationale.

#### A. The San Francisco-Oakland Mailers Doctrine.

The court below, after noting that the "Oakland Mailers doctrine unquestionably expanded Section 8(b)(1)(B) to cover situations not envisioned by the section's enactors" (FP&L Pet. App. 18), nevertheless accepted the Board's argument that the basic rationale of that doctrine was consistent with the purposes of Section 8(b)(1)(B). The court then turned to an examination of that doctrine, from which it concluded that:

"[a] common theme emerges from these cases which at once defines the scope of the Oakland Mailers doctrine and relates that doctrine to the core concerns of Section 8(b)(1)(B). In each case, '[t]he relationship between the Union and its members . . . [was] used as a convenient and, it would seem, powerful tool . . . to compel the Employer's foremen to take pro-union positions in interpreting the collective bargaining agreement.' San Francisco-Oakland Mailers' Union No. 18, supra, 172 NLRB [2174]." (FP&L Pet. App. 20.)

That represents an accurate analysis of the theory underlying the San Francisco-Oakland Mailers doctrine, under which—at least until the Board's companion decisions in Illinois Bell and Wisconsin Electric—the key to the legality of the union discipline in

issue was the nature of the activity for which the superrisor-member was disciplined. Thus, in all of the prior cases under Oakland, the discipline was imposed for some action which the supervisor-member took in interpreting or applying the collective bargaining agreement, or otherwise acting in some capacity as a management representative. But that is not what happened here. The discipline imposed in these cases was precisely that found permissible in NLRB v. Allis-Chalmers, 388 U.S. 175. In other words, the supervisor-members in this case were fined not for interpreting the contract or acting as a spokesman for management in dealings vis-a-vis the union, but solely for crossing an authorized picket line and performing struck work-work which normally would be performed by non-supervisory bargaining unit employees when there was no strike. The contrast between the instant cases and the "common theme" underlying the San Francisco-Oakland Mailers doctrine readily appears on examination of some of the key cases which enunciated and applied that doctrine.

In the San Francisco-Oakland Mailers case itself, the charges against the supervisor-members were based on "disagreements involving contract interpretations or grievance adjustment" between the union and the foremen (172 NLRB at 2173). In other words, the foremen there were disciplined because of their actions in dealing with employees concerning the administration of the contract.

Next, in Toledo Locals Nos. 15-P and 272, Lithographers and Photocogravers International Union (Toledo Blade Company), 175 NLRB 1072, the supervisors were disciplined, as acknowledged by the Board's brief here (p. 21) for "alleged contract violations."

As noted by the Trial Examiner there, the complaint had alleged that the respondent unions had unlawfully disciplined the supervisor members "for the manner in which the superintendent and foremen, as supervisors and representatives of the Blade, had interpreted and administered the Blade's existing bargaining contract with Local 15-P." (Id. at 1072.) It is thus clear that, while the questions concerning the supervisor-members' contract interpretation arose in the course of a strike, the Board treated that case strictly as one involving union discipline of supervisor members for the latter's role in interpreting and applying the contract.

While it is true (Board brief, pp. 22-23), that the Sixth Circuit's affirmance of the Board's decision referred to the duties of the supervisors which their employer required them to perform during a strike," the controlling point there—which stands in marked distinction to the present cases—is that the duties for which the supervisor-members were fined related to their function as collective bargaining representatives in interpreting and applying the contract.

The same situation obtained in Sheet Metal Workers International Association, Local Union No. 49 (General Metal Products Inc.), 178 NLRB 139, enforced 430 F.2d 1348 (10th Cir.). As the court there observed, the respondent local was seeking through the discipline "to enforce its viewpoint as to the meaning of the contract." (430 F.2d at 1350.) Similarly, in Dallas Mailers Union, Local No. 143, 181 NLRB 286, en

<sup>&</sup>lt;sup>14</sup> NLRB v. Toledo Locals Nos. 15-P and 272, 437 F.2d 55, 57 (6th Cir.).

forced 445 F.2d 730 (D.C. Cir.), as the court below explained in its decision herein, the foreman was disciplined "for being too strict with one of the employees under his supervision, and the record clearly indicated that the union desired to have the foreman replaced." (FP&L Pet. App. 20.)

The Board's brief (at pp. 23-24) argues for a broader reach to the San Francisco-Oakland Mailers doctrine, based on two decisions involving the same parties, New Mexico District Council of Carpenters (A. S. Horner, Inc.), 176 NLRB 797 (Horner I) and 177 NLRB 500 (Horner II), both enforced 454 F.2d 1116 (10th Cir.), claiming that the discipline there was for "actions unconnected with either grievance adjustment or contract interpretation." (Board brief at 23.) Those cases do not help the Board, however. In Horner I, the supervisor was disciplined for hiring non-union carpenters and for signing a company letter to employees urging them to vote against the Union in an NLRB election. In the first of these activities he was clearly acting as a supervisor in his function of hiring employees; and, in signing the letter to the emplovees, he was, as Board member Fanning stated in his dissenting opinion in Illinois Bell, "performing a normal supervisory function of informing employees of how management preferred to deal with employee grievances and complaints-a system of direct dealing with employees rather than dealing with them through a representative." (App. 169, at n. 8.) As the court below stated, "Obviously, it is a part of a supervisor's collective bargaining duties to urge management's viewpoint on union members. The union thus disciplined a supervisor for the effective performance of his collective bargaining function, bringing the case squarely within the Oakland Mailers rationale." (FP&L Pet. App. 20, at n. 18.) And, in Horner II, the supervisor-member could have avoided union discipline only if he had quit his job with his employer, with "the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances." (177 NLRB at 502.) Therefore, as the court below said herein, although Horner II does not fit neatly within the San Francisco-Oakland Mailers doctrine, it "thus falls close to the original rationale of §8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing." (FP&L Pet. App. 21.)

Finally, the Board seeks support (brief, pp. 24-25) from Meat Cutters Union Local 81 (Safeway Stores), 185 NLRB 884, enforced, 458 F.2d 794 (D.C. Cir.), where a supervisor-member was disciplined for instituting, at company direction, a new meat procurement policy. The underlying dispute was thus over contract interpretation, and the union used its internal disciplinary proceedings to enforce its view of the contract. The analysis of the court below in these cases of its earlier opinion in Meat Cutters is instructive:

"When Meat Cutters was appealed to this court we were clearly concerned that the Board's Section 8(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors. Our objections to such a prohibition are explained in greater detail in Part III of this opinion, but suffice it for now to state that such an approach inequitably gives supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its brief in Meat Cutters, however, the Board sought to meet these fears and dispel them.

'[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield,' the Board argued. 'Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. \* \* In fact, the Board has recently dismissed a Section 8(b)(1)(B) complaint on the ground that the infraction of union rules for which the emplover representative was disciplined did not involve the exercise of supervisory or managerial authority,' NLRB brief at 15 in Meat Cutters Union Local 81 v. NLRB, supra.

"Partially on the basis of these representations we enforced the Board's decision but with the explicit caveat that '[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has performed duties as a management representative. \* \* The N.L.R.B. has made it clear that a union may legally discipline a supervisor-member for acts which are not performed by the individual in furtherance of his obligations as the employer's representative.' Meat Cutters Union Local 81 v. NLRB, supra, 147 U.S. App. D.C. at 379-380 n. 12, 458 F.2d at 798-799 n. 12 (Emphasis in original.)

"Perhaps it is unfair to suggest that the Board is dissembling in seeking to draw some support for its present position from *Meat Cutters*, but certainly it is clear that the Board is changing its interpretation of the law to suit the case." (FP&L Pet. App. 26-27.)

# B. The Present Cases Do Not Fit Within the San Francisco-Oakland Mailers Rationale.

What is revealed by the above discussion is that, up until the Board's decisions in *Illinois Bell* and *Wisconsin Electric*, the *San Francisco-Oakland Mailers* doctrine rested on the rationale that Section 8(b)(1) (B) bars

"... not only direct union pressure upon an employer to replace his chosen collective bargaining or grievance adjustment representative, but also the indirect pressure which results from union discipline of a supervisor with collective bargaining or grievance adjustment responsibilities, who is a union member, for the manner in which he has performed not only those duties, but also his other lawful functions as a management representative (hereafter 'supervisory or management functions')." (Board brief at pp. 17-18. Footnotes omitted.)

It is simply impossible logically to conclude that the instant cases fit within that rationale, a conclusion drawn not only by the court below and dissenting member Fanning, but by the Board's trial examiner in *Illinois Bell*. As the Court of Appeals stated (at FP&L Pet. App. 21-22):

"The cases before us, however, are critically different from those decided under Oakland Mailers and lie outside the rationale of that case and its progeny. In both cases here the union has disciplined supervisors, not for the way they interpreted the collective bargaining agreement, not for being too strict with union members, but simply for crossing a picket line to perform rankand-file struck work. There is no underlying dispute relating to contract interpretation or grievance settlement in these cases, but rather an economic clash between union and employer totally unrelated to the manner in which supervisors perform their collective bargaining or grievance settlement functions. As the trial examiner in *Illi*nois Bell pointed out, the previous cases are all

'readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects.

"[App. 186.] And as Member Fanning pointed out in dissent:

'Here the supervisors were not fined because they gave directions to the work force. interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union. They were fined because they performed production work in the bargaining unit during a strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. \* \* \* ' [App. 170-171.]"

The Board argues, however (brief, pp. 36-39), that when a supervisor performs the work of rank-and-file employees during a strike, he is functioning in a supervisory or representative capacity.

"But saying that rank-and-file labor is part of a management function is tantamount to saying that black is white. Whatever the parameters of Meat Cutters' 'management function' test may be, the term 'management function' has no meaning except in contrast to the concept of rank-and-file work. And the Board's reference to management's 'right' to expect supervisors to perform rank-and-file work is nothing but a facade by which the Board hopes to avoid analysis by assuming the answer to the question before it." (FP&L Pet. App. 28.)

We submit that this rejection by the Court of Appeals of the same argument below is more than adequate to refute the legalistic legerdemain offered by the Board here. Much of that effort is devoted to a protest over the conclusion of the court below that "[t]he dividing line between supervisory and nonsupervisory work in the present context is sharply defined and easily understood." (FP&L Pet. App. 25; Board brief at 38-39). It is all too confusing, says the Board, arguing further that a supervisor disciplined in this context is unlikely to make "subtle distinctions" if the union later attempts to interfere with his performance in his collective bargaining or grievance adjustment role. (Board brief, p. 35.) <sup>16</sup> The Board's claims of

<sup>15</sup> Similar arguments are advanced by Florida Power and Light (FP&L brief in No. 73-556, at pp. 10-11) and the Graphic Arts Union Employers of America, amicus curios (brief, pp. 14-18).

The Board's argument on this point adds little enough in the way of aid to the Court's analysis of the issue before it. Its use of

"subtle distinctions" and lack of sharp definitions simply have no meaning in the context of these cases. As the court below noted, the present case presents a polar situation, and Judge Leventhal, concurring, stated that the protection given to employers under the San Francisco-Oakland Mailers doctrine "cannot be extended to the cases before us, which lie at the opposite end of the spectrum." (FP&L Pet. App. 55.) 16

The Board also contends that, "During a strike, supervisory and rank-and-file work is even more apt to be commingled." (brief, at 38-39.) The Board there cites (at n. 38) San Francisco Typographical Union No. 21 (California Newspapers), 192 NLRB

such prejudicial invective as "a supervisor who has once felt the union's lash" (Brief, p. 35) is an effort to achieve success through emotional rather than logical appeals.

16 Indeed one recent article referred to the performance of struck work as that "[which] is, by definition, nonsupervisory work." Note, Limitations on the Right of Unions to Discipline Supervisors, 53 B.U.L. Rev., 1019 at 1036 (1973). Another, criticizing the majority opinion of the original panel decision in the court below stated that, "If the court was suggesting that the performance of rank-and-file work during a strike is part of the responsibility of a collective bargaining representative, it is submitted that the court's expansive definition of a representative's duties far exceeded reasonable bounds." Note, Union Discipline of Supervisors: Illinois Bell Telephone Co., 14 Wm. & Mary L. Rev. 674, 694 (1973). Still another put it this way:

"Indeed, rank and file work does not even involve the exercise of authority on behalf of the employer which characterizes not only the processes protected by section 8(b)(1)(B) but also all supervisory duties; consequently, supervisors can easily distinguish discipline for performing rank and file struck work from discipline for the manner in which they represent the employer in those processes."

Note, Union Discipline of Supervisors Who are Union Members for Performing Rank and File Struck Work is not an Unfair Labor Practice, 87 Harv. L. Rev. 458, 468 (1973).

523, where supervisors were fined for performing both supervisory and rank-and-file work. That case is also cited at page 25 (n. 19) of its brief, where the Board acknowledges that the Ninth Circuit sustained only the Board's finding of a violation based on the fining of a supervisor for exercising a supervisory function, but declined to enforce that portion of its order finding an additional violation based on the performance of rankand-file work by the supervisors during a strike. NLRB v. San Francisco Typographical Union No. 21, 486 F.2d 1347, 1349, pending on petitions for certiorari, Nos. 73-1024 and 73-1199. It is clear from that case that, even though the Board may profess some difficulty in distinguishing between supervisory and nonsupervisory functions, the Ninth Circuit had no difficulty in discerning the difference in the precise context in which these cases arise.

These supposed uncertainties, even if they were legally relevant, are also imaginary as far as the supervisor is concerned. <sup>17</sup> He knows what his normal functions are and what additional functions he has been instructed to perform during a strike. Moreover, he knows what constitutes rank-and-file work, for otherwise he could not direct its performance. In any event, as Judge Leventhal said, rank-and-file work "lie[s] at the opposite end of the spectrum" from supervisory functions (FP&L Pet. App. 55).

<sup>&</sup>lt;sup>17</sup> The Board does not explain why the onus of any uncertainty should be placed on the union by limiting its power to discipline its members, rather than on the employer who can give the supervisor whatever guidance is needed. A similar effort to create an unfair labor practice out of possible uncertainties as to an employee's rights was rejected in NLRB v. News Syndicate, 365 U.S. 695, 700. See also Honolulu Star-Bulletin v. NLRB, 274 F.2d 567, 570 (D.C. Cir.) discussing at greater length the Board's theory in that litigation.

The Board, Florida Power and the Amicus, Graphic Arts Union Employers, all argue in substance that any action undertaken by a supervisor or other management representative at the employer's direction is immune from union dis cipline under Section 8(b)(1) (B). Those claims are met both by the language of the Act and the legislative history. As previously noted, Section 8(b)(1)(B) speaks only of collective bargaining and grievance adjustment functions. Thus, even under San Francisco-Oakland Mailers, only discipline of management representatives for their conduct specifically related to the performance of collective bargaining or grievance adjustament activities should be barred. The Board has not, however, so limited its new doctrine and has equated the coverage of that section to the full scope of supervisory duties as defined in Section 2(11). Even accepting the broader test of general supervisory-instead of collective bargaining or grievance adjustment -duties as the test, the action for which the discipline is imposed must bear some resemblance to the act of supervising employees in the performance of their normal work or the direct advancement of the employer's position by his representative vis-a-vis the employee or the union. It is for these purposes only that Congress intended the employers to have the "undivided lovalty" of foremen. But it was never suggested that they were entitled to their "undivided loyalty" in the performance of rank-and-file work, or to operate as strikebreakers. 18

<sup>&</sup>lt;sup>18</sup> See, in addition to the legislative history set forth in Section II, *supra*, the following: H. Rep. No. 245 on H. R. 3020, pp. 8, 116 (1 Leg. Hist. 299, 307); Extension of remarks of Senator Ball, Cong. Rec., May 13, 1947, A 2377 (2 Leg. Hist. 1523-1524).

Perhaps sensing the weakness in the Board's effort to metamorphosize the purest form of nonsupervisory activity into a supervisory or management function, the Graphic Arts Union Employers, amicus curiae, takes a bolder approach in its brief. It proposes a different test under which no discipline may be imposed on any action taken by a supervisor "in the interest of the employer." (Graphic Arts brief, p. 14.) Further, all work performed by a supervisor during a strike is in the employer's interest, is therefore managerial and is accordingly immune from union discipline (brief, at 17).

A "management interest" test is faulty, however, in several respects. First, it reaches even further beyond the bounds of Section 8(b)(1)(B) than does the Board's effort here to defend the instant cases as a proper application of that section. Second, it sweeps with too broad a brush; a rank-and-file employee who chooses to return to work during the course of a strike is also acting in the employer's interest. But no one would seriously contend that his discipline could violate Section 8(b)(1)(B). Neither the Board, the Amicus, nor Florida Power can escape the necessary conclusion that the test of the legality of discipline under Section 8(b)(1)(B) is the nature of the activity for which the supervisor is fined. As member Fanning, dissenting in Illinois Bell, stated:

"If the restraint is imposed upon the supervisor because of his actions in matters unrelated to his general supervisory functions there is no restraint upon the employer with respect to his selection of representatives to perform such functions though he may of course be restrained from the selection of representatives to perform other functions. . . . [A] union-imposed restraint upon a super-

visor because of matters unconnected with his performance of collective-bargaining functions does not restrain or coerce him in the performance of the latter functions and, that being the case, there is no restraint or coercion of the employer in the statutory sense." (App. 170.)

The Graphic Arts brief also relies on the Board's companion (to Illinois Bell) decision in Wisconsin Electric Power Company (App. 195, et seq.), enforced sub nom NLRB v. Local 2150, IBEW, 486 F.2d 602 (7th Cir.), where the Board majority argued that to permit the union to discipline supervisor-members for performing struck work would permit it "to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform." (App., 199). But this assumes the point at issue, which is whether the employer did have "a right to expect a supervisor to perform" rank-and-file work during a strike. If the employer had such a right, its source must be found in this statute, and not in the Graphic Arts' or the Board's view of what the law should be. And none of the briefs on the Petitioners' side points to anything in the statute which creates such a right by terms, or anything in the legislative history which suggests that Congress intended to create such a right.

Moreover, the Board's reasoning in Wisconsin Electric, incorporated by reference in its opinion in Illinois Bell, simply does not withstand scrutiny. It rests on the premise that a union may not "interfere with" the performance of duties by a management representative with collective bargaining or grievance adjustment responsibilities. That premise is demonstrably faulty.

What is now Section 8(b)(1)(B) had its genesis in Section 8(b)(1) of S. 1126, as reported. That provision made it an unfair labor practice for a union "to interfere with, restrain, or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." (S. 1126, p. 14; 1 Leg. Hist. 112 Emphasis supplied.) However, in H.R. 3020, as it subsequently passed the Senate, the provision had been changed to its form in the Act as finally enacted. Specifically, the words "interfere with" had been deleted, and only restraint or coercion were prohibited. (p. 81; 1 Leg. Hist. 239.) The words "interfere with" were deleted on the motion of Senator Ives, without objection. 93 Cong. Rec. 4398, 5106; 2 Leg. Hist. 1138-1139, 1454. (See NLRB v. Drivers Local Union, No. 639, 362 U.S. 274, 285.)

As noted in the dissent in *Illinois Bell*, the most that can be said of the fines imposed on the supervisors here is that they may constitute "interference with" the Employers' control over their collective bargaining or grievance adjustment representatives. (The majority opinion in *Wisconsin Electric*, cited above, refers twice to such fines as "interfering with" the duties assigned by the employer to its supervisors.) As aptly stated by Member Fanning, however, "The words 'interfere with' were eliminated from the section by an amendment offered by Senator Ives because of their farreaching impact. I cannot agree to the reinsertion of those words by decisional interpretation." (App. 174.)

It is noteworthy that most of the courts of appeals passing on the issue herein have rejected the position of the Board, as have an overwhelming number of law review comments. As noted above, the Ninth Cir-

cuit squarely, indeed almost summarily, rejected the Board's position. NLRB v. San Francisco Typographical Union No. 21, 486 F.2d 1347. (FP&L Pet. App. 119.) Similarly, in a recent decision the Third Circuit, while not indicating its ultimate position, remanded the decision there "for findings on the type of work performed by the three [supervisors] during the strikewhether supervisory or rank-and-file struck workand a determination in the light of International Brotherhood, San Francisco, and Wisconsin Electric." (Erie Newspaper Guild, Local 187 v. NLRB, - F.2d —, 84 LRRM 2896, 2904, remanding 196 NLRB 1121.) While the court there professed no intimation of its ultimate position, it would have enforced the Board's order if it felt that the distinction between supervisory and struck work is without merit.

The Sixth Circuit's decision in *Toledo Blade*, supra, is cited by the Board and Graphic Arts as supporting the Board's position herein. However, as we have demonstrated (p. 30, supra), that case—although arising in the course of a strike—was treated by the Board as a contract interpretation case rather than one in which, as here, supervisors were disciplined for the performance of struck work.

The sole appellate support for the Board's position is the Seventh Circuit's affirmance of its Wisconsin Electric Power decision, supra, 486 F.2d 602 (FP&L Pet. App. 105). The majority opinion of the Seventh Circuit was, as noted there (at n.7) prepared before the release of the en banc opinion below and relies heavily on the now-rejected decision of the panel majority. Essentially, it represents an acceptance of the Board's reasoning in Illinois Bell and Wisconsin Electric.

That reasoning has received an even less hospitable reception from the legal commentators. Virtually all of the articles commenting on either the panel or en banc opinions below have accepted the view that the proper application of Section 8(b)(1)(B) turns to some extent on a balance between the employer and union interests involved, and have concluded that, under the proper balance to be struck, Section 8(b)(1)(B) cannot be applied to the discipline involved here.<sup>19</sup>

### C. The Net Result.

In short, the "evolution" from San Francisco-Oakland Mailers, itself of doubtful legitimacy, does not embrace the instant cases. These cases thus represent, pure and simple, a policy invention on the part of the Board. And, in that undertaking, the Board has forgotten the frequent admonitions of this Court that the job of making policy still belongs to Congress and not to administrative agencies. Even if the Board's new policy were a good one, "Congress' policy has not yet

<sup>19</sup> See, for example, Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers, 1970 Duke L. J. 1067; Note, The Role of Supervisors in Employee Unions, 40 U. Chi. L. Rev. 185, 197 (1972); Note, Union Discipline of Supervisors Who Are Union Members for Performing Rank and File Struck Work Is Not an Unfair Labor Practice, 87 Harv. L. Rev. 458, 466-469 (1973); Note, Union Discipline of Supervisors: Illinois Bell Telephone Company, 14 Wm. & Mary L. Rev. 674, 703-704 (1973); Note, Limitations on the Right of Unions to Discipline Supervisors, 53 B. U. L. Rev. 1019, 1034-1037 (1973); Note, National Labor Relations Act-Section 8(b)(1)(B)-Union Discipline of Supervisory Employees for Strikebreaking Activities-IBEW v. NLRB, 14 B. C. Ind. & Comm. L. Rev. 785, 799-800 (1973); Note, Supervisor-Member Exempt from Union Discipline for Acting in Furtherance of Employer's Interest, 26 Vand. L. Rev. 837, 849-850.

moved to this point." (NLRB v. Insurance Agents, 361 U.S. 477, 500.) The Board's "arguments are addressed to the wrong branch of government. It may be "that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress." (National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 644.) In Local 357, Internamiconal Brotherhood of Teamsters, etc., v. NLRB, 365 U.S. 667, the Board sought to defend a shotgun approach to the hiring hall. The Court sharply rejected that attempt:

"Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet, where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. NLRB v. Drivers, Chauffeurs, Helpers, etc., 362 U.S. 274, 284-290. Where, as here, Congress has aimed its sanctions only at specific . . . practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." (Id. at 676.)

Perhaps Mr. Justice Harlan most succinctly stated the matter in *U.S.* v. *Calamaro*, 354 U.S. 351, 357: "Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon."

The Board attempts to avoid a careful scrutiny of its actions here by falling back on an appeal for deference to its "specialized experience" (Board brief, p. 39). However, "the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decision properly made by Con-

gress." (American Shipbuilding Co. v. NLRB, 380 U.S. 300, 318.) Or, as this Court stated more recently, the deference owed to administrative agencies,

"must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the [unfair labor] practice in question. Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong'." (Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 94-95.)<sup>20</sup>

IV. THE BOARD'S EXPANSIVE READING OF SECTION 8(b)(1)(B) IS AN UNWARRANTED ATTEMPT TO REGULATE UNION STRIKE WEAPONS.

# A. General Principles.

We have previously demonstrated that the scope of Section 8(b)(1)(B) as intended by Congress is narrow indeed. The Board's error in these cases in broadening the reach of that section beyond anything dreamed of by its enactors is compounded by the effect of that expansion as a direct—and forbidden—intrusion into the area of regulation of strike weapons. Thus, the effect of the Board's decisions in these cases is to ban outright one of labor's weapons in the course of a strike, i.e., the maintenance of solidarity through the imposition of discipline on its members who engage in strikebreaking. We note at the outset that, in so doing, the Board has plainly ignored the command of this Court in NLRB v. Insurance Agents' International

<sup>&</sup>lt;sup>20</sup> For other instances where this Court has been compelled to strike down Labor Board intrusions into the Congressional domain of policy making, see, e.g., Local 60, Carpenters v. NLRB, 365 U.S. 651; NLRB v. Local 1212, Radio & Television Broadcast Engineers, 364 U.S. 573; NLRB v. Drivers Local Union No. 639, 362 U.S. 274.

Union, 361 U.S. 477, 497, that it may not sit "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." (See also, 361 U.S. at 489-490.) It has also ignored the statutory command of Section 13 and this Court's decision in Allis-Chalmers, supra.

Section 13 of the Act provides that:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

That the Unions' ability to strike would be impeded or diminished by the construction afforded by the Board to Section 8(b)(1)(B) in these cases arises from the familiar practice of using supervisors as replacements for striking employees in the telephone, utility and other industries.<sup>21</sup> As this Court observed in the *Curtis Brothers case*,<sup>22</sup> in striking down a similarly expansive reading by the Board of Section 8(b)(1)(A),

"... The Board's order ... can only be sustained if such power is 'specifically provided for' in § 8(b) (1)(A), as added by the Taft-Hartley Act. To be sure § 13 does not require that the authority for the Board action be spelled out in so many words.

<sup>&</sup>lt;sup>21</sup> With respect to the 1968 national telephone strike, see, for example, N.Y. Times, April 14, 1968, p. 76, Col. 1, and April 20, 1968, p. 1, Col. 2; Business Week, April 27, 1968, pp. 102-103. A similar use of supervisors was noted during a strike this winter involving the same Unions and the same Employer in the *Florida Power* case presently before this court. (Miami Herald, Nov. 1, 1973, p. B1.)

<sup>&</sup>lt;sup>22</sup> NLRB v. Drivers Local Union No. 639, 362 U.S. 274.

Rather, since the Board does not contend that §8(b)(1)(A) embodies one of the 'limitations or qualifications' on the right to strike, § 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, § 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of §8(b) (1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley." 362 U.S. at 282.

So it is here. The Court there also repeated Mr. Justice Frankfurter's classic admonition in *Local 1976*, United Brotherhood of Carpenters and Joiners v. NLRB, 357 U.S. 93, 99-100, that:

"It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests . . . . The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern 'brain' machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate."

The Court in Curtis Brothers then concluded that:

"Certainly due regard for this admonition quite apart from the caveat in § 13 requires caution against finding in the nonspecific, indeed vague words, 'restrain or coerce' that Congress intended the broad sweep for which the Board contends." 362 U.S. at 290.

That lesson is even more pointed here, where the Board's decisions in issue not only accord an overly "broad sweep" to the words "restrain or coerce" in Section 8(b)(1), but to the specific language of subsection (B) as well.

# B. The Allis-Chalmers Decision.

An additional infirmity in the Board's decisions in these cases arises from the fact that the supervisor-members herein were disciplined for the same conduct that this Court found a proper ground for discipline in NLRB v. Allis-Chalmers Manufacturing Company, 388 U.S. 175. In spite of the fact that, in the words of the court below, "[i]n all relevant aspects, Allis-Chalmers is indistinguishable from these cases" (FP&L Pet. App. 30), the Board's decisions below do not even mention, let alone attempt to distinguish, this Court's decision in Allis-Chalmers. And, in its brief here, the Board skips past a meaningful discussion of that case, noting only that Section 8(b)(1)(A) protects against coercion of employees, while 8(b)(1)(B) bars restraint of em-

ployers, and that different interests are therefore protected (Board brief at 45). The Allis-Chalmers precedent, reaffirmed last term in NLRB v. Boeing Co., 412 U.S. 67, may not be so easily evaded. Since this Court held that the fine of a member for crossing his union's picket line does not constitute "restraint or coercion" within the "meaning of § 8(b)(1)," how can the same union action nevertheless constitute "restraint or coercion" of an employer under subsection (B) thereof? The Board's one paragraph treatment of Allis-Chalmers contains no answer to that question.

The Graphic Arts brief argues in this regard (at p. 16) that discipline of supervisors for actions which are undertaken "in furtherance of management's interest" are unlawful "whenever the dispute can be characterized as a dispute between the employer and the union

<sup>&</sup>lt;sup>23</sup> We note at the outset that the Board has finally abandoned the argument it advanced so strenuously below, that *Allis-Chalmers* is inapplicable to 8(b)(1)(B), since that case turned on the proviso which is limited to Section 8(b)(1)(A) and provides that subparagraph (A) "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ."

The Board has apparently been convinced, as the court below concluded (FP&L Pet. App. 30-31), that this Court's holding in Allis-Chalmers was based on its conclusion that a union's fine of its members for crossing a picket line does not constitute "restraint or coercion" within the meaning of the body of Section 8(b)(1) itself. 388 U.S. at 179, 184, 191-192, 195. Indeed, the Court explicitly stated (at 192, n. 29) that its conclusion, that union discipline in this context was not the prohibited form of "restraint or coercion" applicable to both subsections, made it "unnecessary to pass on the Board holding that the proviso protected such actions." See also in this regard, Sillard, Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield, 38 G.W. L. Rev. 187-190 (1969); Christensen, Union Discipline Under Federal Law. Institutional Dilemmas in an Industrial Democracy, 43 N.Y.U. L. Rev. 227, 268 (1968).

rather than between the union and its members, . . ."
That argument is also part of the underpinning for the Board's decisions in *Illinois Bell* (App. 167) and its companion *Wisconsin Electric* decision (App. 195, 199), where the Board stated as follows:

"Of course, our decision is not meant to imply that a union is completely precluded from disciplining supervisor-union members. It only means that when the underlying dispute is between the employer and the union rather than between the union and the supervisor, then the union is precluded in [sic] taking disciplinary action by Section 8(b) (1)(B)."

Those statements and the pursuit of that argument here by the Amicus simply make no sense when placed in juxtaposition to the Board's own analysis of Allis-Chalmers in its bellwether San Francisco-Oakland Mailers opinion:

"The Allis-Chalmers case involved a union's fining of its members for crossing picket lines. The primary relationship there affected was the one between the union and its members, and the union's particular objective—solidarity in strike action—was deemed by the Supreme Court a legitimate area for union concern in the circumstances involved. In contrast, in the present case, the relationship primarily affected is the one between the Union and the Employer, since the underlying question was the interpretation of the collective-bargaining agreement between the parties." (172 NLRB at 2174.)

In other words, in San Francisco-Oakland Mailers and the succeeding cases in that line, the union discipline was based on a dispute over contract interpretation—"in contrast" to the situation in Allis-Chalmers

(and here), where the relationship was essentially between the union and its members. Indeed, the Board in Oakland Mailers specifically noted that the union's objective in Allis-Chalmers-"solidarity in strike action" was held by this Court to be a legitimate one for union concern. Why, then, is it not a legitimate area for union concern here as well? And what happened here to the "contrast" which the Board was able to see so clearly there? Further, if the dispute in Allis-Chalmers-where even the Board acknowledged the Union's legitimate object in preserving solidarity in strike action-was found not to be a dispute "between the union and the employer", how is the dispute in this case—involving the same type of union action and also taken in the strike situation-now transformed into a dispute "between the union and the employer"? 24 As previously noted,

<sup>24</sup> Similarly, there is no basis for any distinction, for which the Board argued below, to the effect that Allis-Chalmers involved only an internal union situation while the situation here is designed to have an external effect on the employer. The internalexternal distinction is plainly lacking in merit, since the discipline imposed in Allis-Chalmers was intended to have no more and no less of an external effect on the employer than that imposed here. And the external effect is the same in both cases. As the court below stated, "The internal-external distinction thus has nothing to do with who is affected by the union discipline. As the Court recognized in Scofield, union discipline normally affects all three participants in the union-management relation, employer, employee, and union." (FP&L Pet. App. 35.) If discipline is imposed strictly within the union, it remains internal; it becomes external only if the union seeks to enforce it through the member's employer:

<sup>&</sup>quot;... The Court thus essentially accepted [in Allis-Chalmers] the position of the National Labor Relations Board dating from Minneapolis Star & Tribune Co., 109 NLRB 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that

the Board's decision in these cases did not even mention Allis-Chalmers, and the Board's brief here offers no answer to these questions.

In sum, there is nothing in Section 8(b)(1)(B) which prohibits the same type of union discipline, for the same offense, and under the same circumstances, merely because the discipline is imposed upon members of the union who happen to be supervisors.

After sidestepping the thrust of Allis-Chalmers, the Board argues that the more relevant case is NLRB v. Industrial Union of Marine and Shipbuilding Workers 391 U.S. 418, where the Court refused to allow unions to enforce rules which are "contrary to the plain policy of the Act." Scofield v. NLRB, 394 U.S. 423, 429. The policy which would be frustrated here, according to the Board, is that "which Congress has incorporated in the Act, of assuring employers the undivided lovalty of their supervisors." (Board brief, p. 46.) One difficulty with that analysis is that the policy to which the Board refers was, as shown above, incorporated in sections of the Act other than 8(b)(1)(B), was aimed at a different and broader problem than that covered by Section 8(b)(1)(B) and embraces a different category of management agents than those specified in 8(b)(1)(B). Moreover, it is well to recall that in Marine and Shipbuilding Workers, the policy upon which the Court found the union's rule impinged was the basic and historic jurisprudential principle of free access to

the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority . . . ' (Scofield v. NLRB, 394 U.S. 423, 428.)

See further 87 Harv. L. Rev., supra, at 464, n. 44; 53 B.U. L. Rev., supra, at 1025-1026; 14 B.C. Ind. & Comm. L. Rev., supra, at 793-794.

judicial and quasi-judicial bodies for effectuation of statutory rights. As the court below observed in this very different context, "If one thing is clear after Allis-Chalmers, it is that there is no 'overriding policy of the labor laws' which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rank-and-file struck work." (FP&L Pet, App. 31.)

Our view that this Court's decision in Allis-Chalmers strongly supports our position herein is shared by several legal commentaries, the most notable being the leading article by Stanford Professor William Gould, Some Limitations Upon Union Discipline under the National Labor Relations Act: The Radiations of Allis-Chalmers, at 1970 Duke Law Journal 1067. The right of unions to discipline supervisors is discussed in some detail by Professor Gould at pages 1127-1129. His analysis is as follows:

"What union discipline, then, is proper and lawful because it does not affect the foreman-member in his supervisory capacity and therefore does not coerce and restrain the company as such? In dismissing a section 8(b)(1)(B) charge where the supervisor was fined for not complying with union registration requirements, the Board has affirmed trial examiner language to the effect that a union does not violate Section 8(b)(1)(B) by fining 'any supervisor for whatever reason, including, for late payment of dues or disruption of the union meeting. . . . 'The critical question is whether the conduct which the union seeks to restrain through a fine is essential or critical to the supervisory function and therefore within management's nonrestrainable rights under Section 8(b)(1)(B).

"But suppose one applies the Allis-Chalmers fact situation to Section 8(b)(1)(B). Is it possible

to fine a violation for fining strikebreakers where management employs strikebreaking supervisors who perform production work?... If, as the Court said in Allis-Chalmers, the union has a substantial interest in disciplining strikebreakers, that analysis ought not to be altered simply because they happen to be in supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective." (Id. at pp. 1128-1129. Emphasis supplied.) 25

### V. THE COURT OF APPEALS DECISION REPRESENTS THE AC-COMMODATION OF THE VARIOUS INTERESTS INVOLVED WHICH WAS INTENDED BY CONGRESS.

The Board argues that its decisions here represent a "fair and reasonable accommodation of the interests involved." (Brief at p. 40.) Even if that were true, the proper inquiry in these cases is whether the accommodation, or policy, for which it argues is that intended by Congress. We have shown above that it is not. We now show that the decision of the court below represents the accommodation of the interests affected by the instant cases which Congress had in mind.

It is significant that the Board devotes scant attention to the interests of employer and unions and that most of its discussion is devoted to the "legitimate interests of supervisors" (brief, pp. 44, 42-44). Immediately after the quoted phrase, the Board's brief contains this astonishing statement:

"Although the protections of the Act are not extended to supervisors as such, it is both unfair and unwise as a matter of policy to force the

<sup>&</sup>lt;sup>25</sup> To the same effect are 14 B. C. Ind. & Comm. L. Rev., supra, at 788, 792; 53 B.U. L. Rev., supra, at 1025; 26 Vand. L. Rev. at 848 ("The [original Illinois Bell panel majority's] dismissal of the reasoning of Allis-Chalmers probably is not supportable.").

supervisor, as the court below would, to choose between equally damaging courses of action." (Board brief at 41.)

The Board thus concedes—as it must—that Congress deliberately stripped from supervisors their rights under the Act, but then advances its own policy notions why the discipline in this case is nonetheless "unfair" to supervisors. This argument underscores that the Board's decisions in these cases rest upon a policy of its own creation and that its real quarrel is with the policy adopted by Congress some 27 years ago. But, even though the Board may desire a broader reach for Section 8(b)(1)(B), it "cannot go further and establish a broader more pervasive regulatory scheme" than that which Congress has in fact enacted. (Local 357. International Brotherhood of Teamsters, etc. v. NLRB, 365 U.S. at 676). We now discuss, in the proper statutory context, the various interests involved and show that the decision of the court below reflects an accommodation which is both fair and fully in accord with Congress' policy.

A. The emphasis on supervisors' interest in the Board's brief, as well as that underlying its decisions in these cases, is completely misplaced and further demonstrates the weakness of the Board's position. Perhaps the lesson revealed with greatest clarity from the legislative history of Sections 2(3) and 14(a) is that Congress deliberately deprived supervisors as defined in Section 2(11) of the protections of the Act. (See pp. 17-23, supra.) Neither Section 8(b)(1)(B) nor any other section was designed by Congress for the protection of supervisors. While Congress' solution to the "divided loyalties" problem may seem to be too Draconian for the Board's tastes now, the intention of

Congress cannot be disputed. In short, supervisors no longer have any interests to be protected under Section 8(b)(1)(B). Moreover, because the precise language of Section 8(b)(1)(B) is ignored or glossed over throughout much of the Board's brief, it is well to recall that it speaks only in terms of restraint or coercion of "an employer," rather than of "a supervisor."

Thus, there is no Section 7 right granted to supervisors. If there is to be a change in that regard, the remedy must be provided by Congress and not by the Board on its own motion. Nevertheless, the effect of the Board majority's decision below is to free these union members, merely because they are supervisors, from the normal obligations and duties owed by a member to his union, and to grant to supervisors a type of Section 7 right which Congress expressly denied them in 1947. Indeed, because it would free them from the normal contractual obligations owed their union, the Board has granted them rights which actually exceed those of other union members, as held in Allis-Chalmers.<sup>26</sup>

There is a futher answer to the Board's concern for the "plight" of supervisors. Under this Court's holdings in NLRB v. Granite State Joint Board, Textile Wokers Union of Ameica, 409 U.S. 213, and Booster Lodge 405, International Association of Machinists v. NLRB, 412 U.S. 84, the supervisor-members can at any time resign their union membership and thereby their

<sup>&</sup>lt;sup>26</sup> It is noteworthy that all IBEW members (including supervisors and those on withdrawal cards) remain under an oath of obligation to abide by the IBEW constitution and to bear allegiance to the IBEW (App. 149, 150).

union's power over them. They are thus presented with a complete avenue of escape.<sup>27</sup> Although it is of course true that a member who resigns from the union thereby forfeits whatever benefits may accrue to him solely as a result of his membership, to argue as the Board does that this imposes a "heavy penalty" (brief, at 41) on the supervisor simply highlights the fact that the Board, as the supervisors' advocate here, simply wants them to have it both ways. And, in addition to the lack of any statutory protection for the supervisors, such an argument does not make out a very strong case for "fairness". <sup>28</sup>

<sup>&</sup>lt;sup>27</sup> Of course, in *Florida Power and Light*, the collective bargaining agreement (in force in a right-to-work state; Fla. Const., Dec. of Rights, Sec. 12) contains no union security provision compelling membership by supervisors or any one else. Membership in the Union on the part of the supervisors here in issue was thus voluntary (App. 43).

And, in *Illinois Bell*, where the union security clause states that employees in the bargaining unit must remain union members in good standing, the provision further provides that an employee "shall be deemed to be a member in good standing so long as he pays or tenders to the Union an amount equal to the regularly recurring monthly Union dues for the remainder of the term of this Agreement. . . . " (App. 118.)

<sup>&</sup>lt;sup>28</sup> The view of the court below with respect to the "ordinary standards of equity and fairness" insofar as they apply to supervisors is markedly different from that of the Board. The court noted that:

<sup>&</sup>quot;These supervisors directly benefit from union membership, not just from the fringe benefits available to all union members, but from the contract which the union negotiates with management... Can it fairly be said that Congress intended that supervisor-members can perform rank-and-file struck work, undercutting a strike from which they serve to benefit and remain immune from union discipline while all other members of the bargaining remain bound by the majority decision of the union to go out on strike?" (FP&L Pet. App. 46-47.)

B. As noted, the Board argues that employers should be free to demand the total loyalty of their supervisors during a strike, regardless of the type of work in which they are engaged during that strike. The short answer to this argument is that, even assuming that, contrary to our contention, the "divided loyalty" issue were a consideration at all under Section 8(b)(1)(B), an employer can easily avoid that issue altogether by refusing to allow his supervisors to remain union members. Neither company in these cases has availed itself of that opportunity.<sup>29</sup>

Not only has *Illinois Bell* been content to permit its supervisors the right to remain union members and to be covered for some purposes by the collective bargaining agreement, but it should be recalled that the Company did not command its supervisors to work during the strike. Rather, its supervisors were given the option of whether or not to work (App. 259, 265-266, 272), and some who refused to work were nevertheless promoted after the conclusion of the strike (App. 277-277A, 288). Further, some supervisor-members who chose to return to work and perform their regular duties, but who refused to perform rank-and-file work during the strike, were allowed to remain on the job. They were not disciplined by the Union. (App. 286-287.)

foremen, as well as employees, since it became bargaining representative of the Company's employees in 1909 (Board brief, at pp. 4-5; App. 202-203). Since that date, foremen and general foremen have remained not only members of the Union, but an integral part of the bargaining unit and beneficiaries of the collective bargaining agreements. Their wages, hours and working conditions were specifically bargained for until 1959; since that time, their wages have been omitted from the agreement. At all times, up until the present, they have been covered by the union security provisions (App. 202-203, 117-118, 120-137, 147).

There are, as all of the opinions below noted, certain benefits to employers in permitting supervisors to remain union members when elevated from rank-and-file employee status; benefits which employers may not want to give up. The value of the retention of benefits accruing to supervisors who remain union members. particularly in the context of the desirability of the unward mobility of labor, was forcefully noted by the concurring opinion below (FP&L Pet. App. 52-57). That opinion gave due recognition both to the unique status of craftsmen who are promoted to foreman status and to the congressional policy of encouraging the upward mobility of labor by permitting the retention of benefits accrued through years of union membership. As Judge Leventhal observed, foremen, although members of management, possess a character akin to that of non-commissioned sergeants in the military, bearing a special relationship both to upper management and to the employees with whom they share a direct working relationship (FP&L Pet. App. 53).30 These may well be among the reasons why the Employers here opted for allowing their foremen to remain in the Unions.

In any event, if an employer wants the "undivided loyalty" of his supervisors, it is easy enough for him to accomplish that. But it is hardly "fair and reasonable" for an employer to attempt to achieve that goal while retaining the benefits which he has gained in bargain-

<sup>&</sup>lt;sup>30</sup> The action of *Illinois Bell*, in particular, in refusing to direct its foremen and general foremen to work during the strike stands as a clear recognition by that Company of the dual loyalty of those foremen during the time of a strike, based on their unique status.

ing by allowing them to continue their union membership.<sup>31</sup> As Professor Gould properly reasoned:

"... [S] upervisors who remain union members are most often obtaining additional benefits. Frequently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the Allis-Chalmers rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign." (Gould, supra, at 1970 Duke L. J. at 1129.)

As noted by the court below, the effect of its decision is not to dictate that employers waive completely their right to the loyalty of their supervisors: "Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by Oakland Mailers and Meat Cutters, im-

<sup>&</sup>lt;sup>31</sup> Following the *en banc* argument below, the court asked the parties to submit certain additional evidence (App. 204). The response of IBEW Local 134 (App. 209-210) made reference to an attached (App. 211) "Agreement" between Local 134 and Illinois Bell, dated September 28, 1971, three years after the strike giving rise to the instant case, under which Illinois Bell agreed to drop all efforts to seek the exclusion from the bargaining unit of the foremen classifications included therein, in exchange for which it obtained a substantive jurisdictional concession by the union. That document represents a tangible example of the kind of benefit which an employer may obtain by agreeing to allow its supervisors to remain in the union.

munizes them from union discipline imposed for the manner in which they have performed their supervisory functions." (FP&L Pet. App. 50. Emphasis supplied.) And, as the court there stated, an employer which has agreed through the collective bargaining process to accept the union membership of his foremen may also demand contractual restrictions against union discipline. In the words of the Court of Appeals:

"[T]he employer may condition his permission for supervisors to remain union members upon the union's agreeing to a bargainng contract clause that immunizes supervisors from union discipline for performing rank and file struck work. As we have already seen, such an agreement by which the employer permits supervisors to join unions upon condition that the union give up part of its control over the supervisors is a mode of dealing with the problem of supervisor conflicts of loyalty that, in contrast to the Board's approach, has a firm basis in history both before and after passage of the 1947 amendments. Not only is it historically sound. but it comports with the Act's pervasive focus on collective bargaining as the means for resolving labor-management conflicts. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45." (FP&L Pet. App. 50-51.)

In Florida Power, a contract provision states that employees "in a supervisory capacity may not be 'jacked up' or disciplined through Union machinery for the acts they may have performed as supervisors . . ." (App. 47.) In Illinois Bell, a 1954 Memorandum of Understanding, which was reaffirmed in 1971 (see page 62, n. 31, supra), states that certain supervisory classifications would be allowed to continue their union membership, but adds that "any allegiance they owe

to the union shall not affect their judgment in the disposition of their supervisory duties." (App. 113.)

From its contract, Florida Power argues (brief, pp. 14-16) that that provision rebuts our challenge to the Board's finding in that case (Florida Power brief, at 14-16). The response to that contention and to any like contention which may be based on the Illinois Bell Memorandum of Understanding, is two-fold: First, neither Company took any action to institute its contractual machinery in support of a position that the Union's action in either case violated either the Memorandum of Understanding in Illinois Bell or the quoted contractual provision in Florida Power. Second, the reason why neither may have moved in that direction is the conclusion which must be drawn that the quoted provisions do not reach as far as that suggested by the Court of Appeals. Thus, the Illinois Bell Memorandum of Understanding refers to the foremen's actions in the performance "of their supervisory duties." In Florida Power, the prohibition applies only with respect to "acts they may have performed as supervisors." And, as we have shown throughout this brief, this whole case turns on the fact that the actions for which the supervisors here were disciplined were not those taken as supervisors.

C. The union's interest is clear enough, as this Court recognized in *Allis-Chalmers*, 388 U.S. at 181-182:

"Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . .' [citing Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951), note 7] Provisions in union constitutions and by-laws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley Amendments."

# And, as Professor Gould has observed:

"If, as the Court said in *Allis-Chalmers*, the union has a substantial interest in disciplining strike-breakers, that analysis ought not to be altered simply because they happen to be in supervisory positions. The thrust against the union as an institution and against its strike function is just as direct and effective." (Gould, *supra*, at 1129.)

D. As we have shown above, what this case involves—and what the earlier cases under the San Francisco-Oakland Mailers line did not—is the legality of disciplining supervisor members who act as strikebreakers and thereby threaten the solidarity and survival of the bargaining unit.<sup>32</sup> There is no issue in this case involving the employer's right to the unfettered loyalty of supervisors when they act in a representative capacity

<sup>32</sup> It will be recalled that, in both of these cases, the only supervisors who were disciplined were those who performed struck work, and they were disciplined only for the performance of such work. (Illinois Bell: App. 213-215, 286-287; Florida Power: App. 38.)

In Section II of its brief, pages 12-14, Florida Power argues that three supervisors who performed struck work normally (when no strike was in progress) supervised non-bargaining unit employees and that no distinction should be drawn in assessing the legality of the discipline of those three supervisors and others who supervised bargaining unit personnel during non-strike times. We have no quarrel with that position.

in the administration of the collective bargaining agreement, the handling of grievances or even the regular supervision of employees under their direction. Accordingly, in order to remain faithful to the rationale of Allis-Chalmers, the decision of the court below should be affirmed. The alternative is to allow the policy stated in Allis-Chalmers, of permitting unions to protect themselves from internal subversion at the critical time of a strike, to be undercut through the simple device of having unit work performed by union members who are supervisors. Under the decision below, the legitimate interests of both unions and employers are protected, in a manner which is fully consistent with the language of the Act and congressional intent.

Finally, as we have previously noted, a number of the legal commentaries reviewing either the original panel decision or the *en banc* decision below, have, in addition to criticizing the Board's decision in *Illinois Bell*, utilized as an aid to their analyses various balancing tests. And, they have struck the balance each time in favor of the Union's position here and against that of the Board.<sup>33</sup>

We have shown at the outset of this brief that the Board's position here plainly exceeds the literal language of Section 8(b)(1)(B), and that it is lacking in support from the pertinent legislative history, so that the Board's decisions in these cases represent a blatant usurpation of the role of Congress in establishing policy. We have shown, too, that the Board's decisions

<sup>&</sup>lt;sup>33</sup> 87 Harv. L. Rev. 458, 466-469; 53 B.U. L. Rev. 1019, 1034-1035; 14 B. C. Ind. & Comm. L. Rev. 785, 796, 800; 26 Vand. L. Rev. 837, 849-850. See also, 40 U. Chi. L. Rev. 185, 197; 14 Wm. & Mary L. Rev. 674, 703-704.

herein cannot be reconciled with this Court's holding in Allis-Chalmers or with Section 13 of the Act. We have now also shown that the result below is in fact the accommodation of the interests affected which comports fully with the intention of Congress. Accordingly, the decision of the Court of Appeals should be affirmed.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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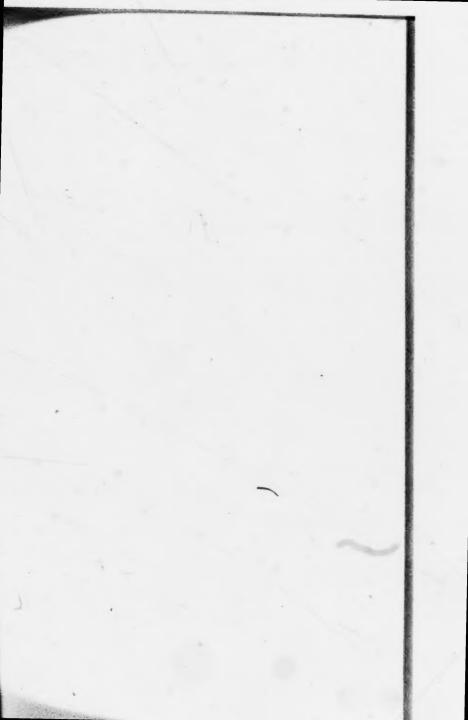
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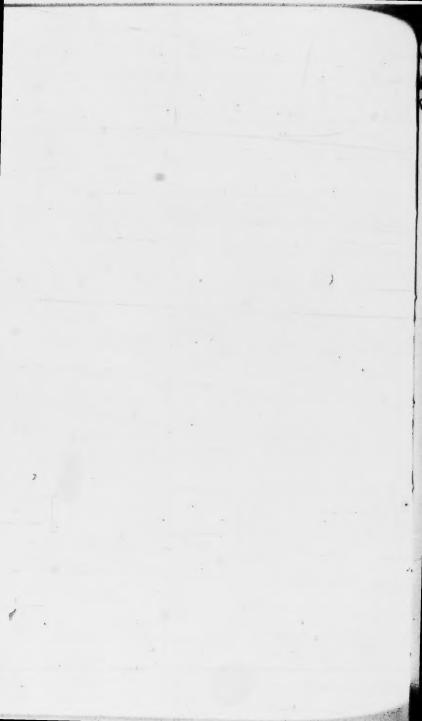
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April 1974





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IN THE

Supreme Court of the United States EL RODAK, JR.

OCTOBER TERM, 1973.

Nos. 73-556, 73-795

FLORIDA POWER & LIGHT COMPANY.

vs.

Petitioner,

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Respondents.

NATIONAL LABOR RELATIONS BOARD,

vs.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

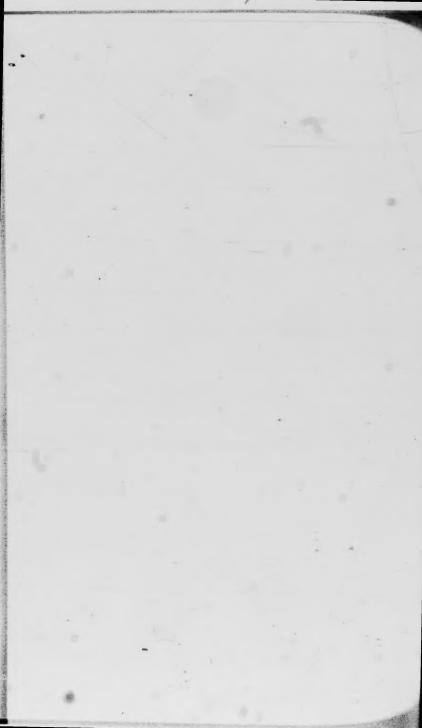
MOTION AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief amicus curiae on behalf of the petitioners in these cases.

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court.\*\*

The issue in this case is of major importance to members of the chamber. This issue is: whether the National Labor Relations Act prohibits a Union from disciplining a supervisor, who is a union member, for performing, during a strike, work ordinarily belonging to striking non supervisory employees.

The National Labor Relations Board concluded that this discipline was statutorily proscribed because a union cannot

<sup>\*\*</sup> E.g., Gateway Coal Company & United Mineworkers of America, et al., ....... U. S. ......, 85 LRRM 2049 (Jan. 1974); Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz v. Lloyd W. McCorkle, et al. (Supreme Court), No. 72-1554; Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Ir. and Lucia DeFunis, his wife v. Charles Odegaard, President of the University of Washington, et al. (Supreme Court), No. 73-235; N. L. R. B. v. Bell Aerospace Company Division of Textron, Inc. (Supreme Court), No. 72-1598. Boys Markets v. Retail Cleis Union, 398 U. S. 235 (1970); N. L. R. B. v. The Boeing Company, et al., 93 S. Ct. 1952 (1973); N. L. R. B. v. Granite State Joint Board, 409 U. S. 213 (1972); N. L. R. B. v. Pittsburgh Plate Glass Co., 404 U. S. 517 (1971).

punish supervisory personnel for furthering their employer's interest by performing rank and file work during a strike. The Court of Appeals for the District of Columbia Circuit had initially affirmed the Board in a panel decision. Subsequently, however, it replaced this decision by a five-to-four en banc decision and there refused to enforce the order of the Board. In its en banc holding, the Court stated that Section 8(b)(1)(B) proscribes only union attempts to discipline supervisors for the manner in which they performed normal management functions, such as regular supervisory work, the adjustment of grievances, or actual collective bargaining.

Affirmance of the en banc position of the Court of Appeals would pose a problem of considerable magnitude for employers in industries, such as construction and graphic arts, for example, where supervisors are often or customarily members of unions. If a union is to be permitted to discipline supervisors, who are also union members, because they perform rank and file work during a strike, an employer will be effectively precluded from utilizing such persons to perform this work and from reducing the severity of the economic pressure resulting from the work stoppage. Furthermore, the disciplinary action permitted by the Court of Appeals would severely abridge management's control over its supervisory staff; thus, this discipline, if found to be lawful, would permit a union effectively to create an intolerable conflict between inconsistent allegiances. The Chamber is, thus, vitally concerned that the issue in these cases be properly resolved by this Court. Because of its broad representation of employers, the Chamber is in a position to present arguments concerning these issues which might not otherwise be advanced by the parties.

Wherefore, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File an Amicus Curiae Brief be granted. Filed herewith in our brief as amicus curiae.

Respectfully submitted,

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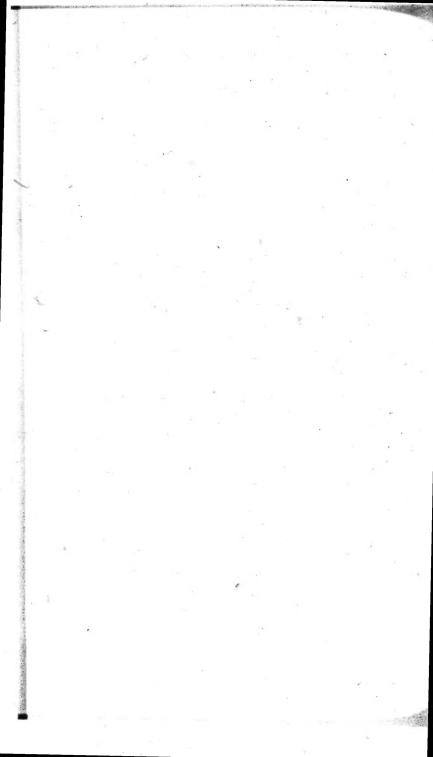
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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

#### SUMMARY OF THE ARGUMENT.\*

Each of these cases arose from an economic strike. In each of these cases, supervisors of the Employer, who were members of the Union, performed work ordinarily belonging to the striking non supervisory employees. Each Respondent Union fined and/or suspended these supervisors for performing this work. The National Labor Relations Board found that the Union's disciplinary action violated Section 8(b)(1)(B) of the National Labor Relations Act. While the court below reversed, the Board's findings are wholly justified.

In order to properly evaluate the scope of Section 8(b)(1) (B), the express terms and history of that section must be considered in conjunction with the legislative history of other sections, dealing supervisors, found in the Act. When this analysis is made, it is manifest that Congress intended that supervisors be part of management and that their employer have complete control over their job related functions. The legislative history of the relevant statutory sections further demonstrates that Congress desired to ensure that the supervisor's obligations to his employer would be paramount, despite any obligations to the union that he might owe, and that an employer would be insulated from union pressure directed against his supervisors.

The courts and Board, responding to this Congressional mandate recognized that a supervisor, once disciplined for simultaneously supporting his employer's position and opposing the union's, whatever the nature of the dispute, will be susceptible to union pressure when again called upon to decide whether to support either his employer or the union; because of this discipline, an employer is no longer able to rely upon the loyalty of his supervisor to adjust grievances on his behalf or to perform other managerial duties, and his control over him is irretrievably

<sup>\*</sup> The interest of the Amicus is contained in the Motion for Leave to File an Amicus Curiae Brief which accompanies this brief.

lost. Accordingly, to ensure that an employer will retain control over his representatives consistent with the expressed will of Congress, this Court should hold that a union may not discipline a supervisor for performing any duties related to his management role, whether or not these duties are connected with collective bargaining or the adjustment of grievances.

When a supervisor, during a strike, performs work ordinarily belonging to striking rank and file employees, he is exercising his managerial responsibilities, and, in addition, is engaged in the process of collective bargaining. By performing this work, supervisors provide their employer with the necessary leverage to better withstand the pressures and impact of the strike. Insofar as supervisors thereby enable the employer to meet his business commitments, they are performing the essence of a manager's functions. Furthermore, a strike is a part of the collective bargaining process. Thus, a supervisor's performance of necessary work in order to combat a strike is as much of a collective bargaining function as is the negotiation of a contract or the adjustment of a grievance. Consequently, disciplining a supervisor in retaliation for his performance of necessary work during a strike violates the express terms of the Statute and contravenes the explicit intent of Congress The discipline in these cases is contrary to the policy of Congress that protects the employersupervisor relationship. Therefore, this Court's decision in Allis-Chalmers does not insulate the discipline in these cases from the proscriptions of the Act.

#### ARGUMENT.

I.

#### INTRODUCTION AND CONTENTIONS OF THE AMICUS.

The issue in these cases is whether the Respondent Unions violated Section 8(b)(1)(B) of the National Labor Relations Act1 when they disciplined the Employers' supervisors, who were members of the Unions, for performing, during strikes. work ordinarily performed by non-supervisory striking employees. In resolving this issue, an evaluation of the proper scope of the Statutory Section is first required. The amicus contends that Section 8(b)(1)(B), despite its express terms, cannot be limited to proscribing only union discipline of an employer's representative that is grounded upon his actions taken in a specific dispute involving the negotiation or administration of a collective bargaining agreement or the adjustment of a grievance. Rather, when considered in conjunction with the legislative history of other statutory sections dealing with supervisors, Section 8(b)(1)(B) prohibits a union from disciplining a supervisor because he exercised his supervisory or managerial responsibility and furthered his employer's interests. This prohibition extends to every dispute that arises between an employer and a union regardless of the nature of the dispute.

In addition, the amicus contends that the concept of supervisory or managerial responsibilities or functions embraces the

<sup>1. 29</sup> U. S. C. Section 158(b)(1)(B) provides:

<sup>&</sup>quot;It shall be an unfair labor practice for a labor organization or its agents—

<sup>(1)</sup> To restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

performance of work ordinarily belonging to rank and file employees who are on strike. By performing this work the supervisors are furthering their employers vital interests.

Finally since the performance of this work effects the bargaining posture of the parties, the amicus contends that any union discipline is proscribed by the literal terms of Section 8(b) (1)(B).

In the administrative decisions underlying this proceeding, the National Labor Relations Board construed 8(b)(1)(B) to limit the right of a union to lawfully punish supervisory personnel, who were union members, taliation for their performance of the work of rank and file employees when these employees were on strike.2 Essentially, in each case, the National Labor Relations Board considered the strike to be an economic dispute between the employer and the union and upheld the statutorily sanctioned right of an employer to control his supervisors and to utilize them in order to maintain his production despite the strike. The Board concluded that to permit union discipline where supervisors support their employer during a strike, would significantly jeopardize the employer's future relationship with and control over his supervisors. That is, whenever employer and union interests clashed, for example, during strike situations or grievance conferences, supervisors, wary of their union's disciplinary rights, would be susceptible to its pressure to deviate from the employer's interests.

<sup>2.</sup> Electrical Workers Locals 641, 622 etc. (Florida Power and Light Co.), 193 NLRB 30 (1971); Electrical Workers Local 134 (Illinois Bell Telephone Co.), 192 NLRB 85 (1971), enforcement denied en banc, 487 F. 2d 1143 (CA D. C. 1973). In addition, see N. L. R. B. v. Electrical Workers, Local 2150 (Wisconsin Electric Power Co.), 192 NLRB 77 (1971), enforced 486 F. 2d 602 (CA 7, 1973) (petition for rehearing denied, August 6, 1973) (petition for cert. filed, No. 73-877, Dec. 5, 1973).

SECTION 8(b)(1)(B) PROHIBITS A UNION FROM DIS-CIPLINING A SUPERVISOR BECAUSE HE EXERCISED HIS SUPERVISORY OR MANAGERIAL RESPONSIBILI-TIES AND FOSTERED HIS EMPLOYER'S INTERESTS.

#### A. Legislative History.

The Board's findings in the instant cases are fully supported by the pertinent legislative history of 1947 amendments to the National Labor Relations Act. These amendments and Congressional debate underlying them demonstrate that Congress' propelling intent was to assure that an employer has complete control over his supervisory force and that he be insulated from union pressures exerted to procure the allegiance of supervisors to the union's own interests. Thus, supervisors were excluded from the Act's definition of "employee", and while they were permitted to join unions, employers were not required to recognize or to deal with these "unions."

In commenting on Sections 2(3) and 14(a),<sup>5</sup> Senator Taft explained:

"It is felt very strongly by management that foreman are part of management that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various inbetween steps, but the general conclusion was that they must either be a part of a management or a part of the employees. . . The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and pro-

<sup>3. 29</sup> U. S. C. Section 152(3) (1970) (Section 2(3)).

<sup>4.</sup> Du Ross, III, Limitations upon Union Discipline of Supervisor Members Under the National Labor Relations Act, 5 Southwestern U. L. Rev. Winter 1974, 311, 315 (1973). (Hereinafter referred to as Limitations Upon Union Discipline.)

<sup>5. 29</sup> U. S. C. Section 164(a) (1970) (Section 14(a)).

ductivity in the factories of the United States." 93 Cong. Rec. 3952 (1947), in II Legis. Hist. at 1008-1009 (emphasis added).

Senator Ball's remarks are consistent with Congress' paramount concern that the loyalty of supervisors to their employees' position be unimpeded by the threat of union pressure.

"The committee took the position that foremen are an essential and integral part of management, and that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free-enterprise system. It might be stated that both the House and Senate bills deal with that subject in substantially the same way."6

"Foreman are an integral part of management and are so regarded now in the law. But the NLRB has also held that they can at the same time be subject to the discipline of the unions of employees they supervise, which just doesn't make sense."

The House, like the Senate, was cognizant of the critical need for employer's to control their agents and that the menace of union punishment could dissipate this necessary control.

In the words of House Report No. 245:

"Management, like labor, must have faithful agents.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence of control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it,

<sup>6. 93</sup> Cong. Rec. 5146 (1947 in II Legis. Hist. at 1496).

<sup>7. 93</sup> Cong. Rec. A 2377 (1947).

and to carry on the whole of labor relations . . . Supervisors are management people . . . So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer,' not an 'employee,' any person 'acting in the interest of an employer'; what it again made clear in taking up H. R. 2239 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for any reason, he does not trust."

Thus, while the specific history surrounding Section 8(b)(1)(B) appears to limit that Section to its literal terms, it is submitted that the construction of that section must be made in conjunction with other 1947 amendments and with the consistent preoccupation of Congress to ensure that employers would enjoy complete control over their agents, insulated from union pressures or the threat of union discipline.

In the words of Judge MacKinnon in the en banc decision of the court below.<sup>10</sup>

<sup>8.</sup> H. R. Rep. No. 245, 80th Cong. 1st Sess. 16 (H. R. 3020), reprinted in I Legis Hist. 411.

<sup>9. 93</sup> Cong. Rec. 4266 (1947) (Reprinted in II Legis Hist at 1077: Unions had "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union." and through the enactment of section 8(b)(1)(B) Congress endeavored "to prescribe a remedy in order to prevent such interferences."

<sup>10. 487</sup> F. 2d at 1176, 1177.

"Section 8(b)(1)(B) must not be interpreted in a vacuum, but must be interpreted in conjunction with the other 1947 amendments to the N. L. R. A. relating to supervisory personnel. The fact that Congress decided to expressly exclude 'supervisors' from the statutory definition of 'employee' in section 2(3) is highly informative.

The correctness of this statement is evidenced by the observations of Senator Taft's report on the proposed 1947 amendments. Taft explained that one of the "major changes" eliminates the genuine supervisor from the coverage of the Act as an employee and makes it clear that he should be deemed a part of management.

The purpose of making supervisors part of management was to assure that management will enjoy the "undivided loyalty of its foremen.12"

While the court below construing Section 14(a) of the Act believed that an employer voluntarily ceded at least a portion

<sup>11.</sup> Carpenters Dist. Council of Milwaukee v. N. L. R. B., 107 U. S. App. D. C. 55, 57, 274 F. 2d 564, 566 (1959) (emphasis added in original).

<sup>12.</sup> S. Rep. No. 105, 80th Cong., 1st Sess. 3, 5 (1947) (S. 1126) reprinted in I Legis. Hist. at 409, 411. Further examples of Congressional intent to protect employer's from all forms of union interference with their supervisors can be found in Du Ross, III, Limitations Upon Union Discipline, supra, at 315.

of his control over his supervisors by *permitting* them to join the union, the history of pertinent legislation is barren of support for that proposition. On the contrary, Congress repeatedly stressed its intent to exclude supervisors from the Act's protection and instead to subject them to the complete control of their employer.<sup>13</sup>

#### B. Judicial and Administrative Decisions.

The response of the Board and courts to these amendments was not long in coming. Early decisions stripped supervisors of the Act's protection<sup>14</sup> and found Section 8(b)(1)(B) violated

13. In the first place, Section 14(a) of the Act must be interpreted with Section 2(3) of the Act. S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947) Reprinted I Legis. Hist. at 411; see Judge MacKinnon's dissenting opinion in the court below. It cannot then be doubted that Congress chose to ensure that supervisors wholly represent management regardless of any union commitments.

"[Supervisors] are supposed to represent management, they are supposed to direct and to discipline and to be loyal to the management's point of view"; 93 Cong. Rec. 3553 (1947). "One cannot serve two masters. It would be an utterly impossible position in which to place a man—he would be paid by his employer but he [would be] expected to go along with the union of which he was a member." 93 Cong. Rec. A. 2011-12 (1974).

The House Report observes, "The bill does not forbid these people [i.e., supervisors] to organize. It merely leaves their oganizing and bargaining activities outside the provisions of the act." H. R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), in I Legis. Hist at 314. Rep. Hartley further noted, "This bill also exempts supervisors from the compulsory features of the National Labor Relations Act. In other words, this bill does not bar them from organizing but they cannot obtain benefits of the act." 93 Cong. Rec. 3533 (1947), in I Legis. Hist. at 613.

Thus, it is apparent that by enacting Section 14(a) Congress did not intend to dilute or undermine the absolute control over supervisors that it bestowed upon employers.

14. L. A. Young Spring & Wire Corp. v. N. L. R. B., 163 F. 2d 905, 906-07 (D. C. Cir. 1947), cert. denied, Foremans' Assoc. of America v. L. A. Young Spring & Wire Corp., 333 837 (1948); N. L. R. B. v. Budd Mfg. Co., 169 F. 2d 571, 579 (6th Cir. 1949), cert. denied, 335 U. S. 900, modifying 162 F. 2d 461 (1947), remanded, 322 U. S. 840.

when unions attempted to compel employers to substitute their chosen representatives with others more amendable to union views.<sup>15</sup>

In these early decisions the struggle was between the employer and union as each sought to secure effective control of the bargaining process; the supervisor involved was generally not the target of union discipline. After facing a virtually unchecked series of set backs in the Board and Courts, the unions turned their sights upon the supervisor himself and by punishing him for transgressing its views and supporting his employer's, sought to turn him from a representative loyal to his employer to one responsive foremost to the union. In the Oakland Mailers case16 the National Labor Relations Board first confronted the issue of whether Section 8(b)(1)(B) proscribes union discipline of supervisors for demonstrating allegiance to their employer when performing managerial duties. Cognizant of the expressed will of Congress that management alone must control its supervisory personnel and that, if permitted, such discipline would be incompatible with this legislative mandate, the Board stated:

" \* \* Respondent's actions \* \* \* were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. [Footnote omitted.] That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charg-

<sup>15.</sup> ILGWU Local 111 (Slate Belt Contractors Assn.), 122 NLRB 1390 (1958); Southern Cal. Pipe Trades Council (Paddock Pools of Cal., Inc.), 120 NLRB 249 (1958). For other more recent decisions see Du Ross, III, Limitations Upon Union Discipline, supra, at 315, 316.

<sup>16.</sup> San Francisco-Oakland Mailers' Union No. 18, 172 NLRB 2173 (1968).

ing Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." 172 NLRB at 2173.

The rationale of Oakland was applied in two recent cases, Toledo Blade<sup>17</sup> and Horner.<sup>18</sup> In Toledo Blade, supervisors were punished by the union, following a strike by a sister local, for performing work during this strike with less than the minimum crew specified by the applicable contract, and for performing more nonsupervisory work than allowed under the contract.

In Horner, no contract existed, and a supervisor was disciplined for signing a letter, issued by the employer, urging employees to vote against the union in an up coming election. In each case, the Board's finding that Section 8(b)(1)(B) was violated was affirmed by a court of appeals. While the decision in Toledo, unlike that in Horner, could have been molded to fit the explicit language of Section 8(b)(1)(B) by holding only that the supervisors were unlawfully disciplined because they interpreted the contract in a manner alien to the union's interests, both the Board and court in Toledo significantly chose instead to give a broader reach to that Statutory Section; a reach wholly consistent with the legislative disposition of the issue of union discipline of supervisory personnel.

#### In the Court's words:

"This conduct of the union could very well be considered as an endeavor to apply pressure on the supervisory employees of the Toledo Blade, and to interfere with the performance of the duties which the employer required them to perform during the strike, and to influence them "to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union would further operate to make the employees reluctant in

<sup>17.</sup> Toledo Locals Nos. 15 and 272, Lithographers and Photoengravers International Union (Toledo Blade Co.), 175 NLRB 1072, affirmed 437 F. 2d 55 (CA 6, 1971).

<sup>18.</sup> New Mexico District Council of Carpenters (A. S. Horner, Inc.), 176 NLRB 797, affirmed 454 F. 2d 1116 (CA 10, 1972).

the future to take a position adverse to the union, and their further usefulness to their employer would thereby be impaired." 437 F. 2d at 57.

In Horner, the Board held that the supervisor was disciplined "because he placed the Company's interests ahead of those of [the Union]," when performing the managerial duty of campaigning against the union, even though this function was perforce wholly unrelated to the negotiation or administration of an agreement or the disposing of grievances.

As the Board reasoned, this "was obviously coercion against the Company because it would tend to require the Company to retain as representatives for collective bargaining and adjustment of grievances only individuals who were subservient to respondents [Union] . . . "19 Thus, as recognized by the court in Toledo, and the Board in Horner, it is this lingering aftereffect of the union's discipline, as much as the discipline itself, that is deleterious to the Employer's relationship with his supervisors. A supervisor, once disciplined for simultaneously supporting his employer's position and opposing the union's, whatever the nature of the dispute, will be susceptible to the threat of union pressure when again called upon to decide whether to stand either with his Employer or with the union.20 It is logically and legally sound to conclude that the union's discipline has significantly and irreparably impaired the supervisor's value to represent his employer in adjusting grievances or in performing other functions where his employer's interests will clash with those of the union; because of this discipline, the employer is no longer able to rely upon his supervisory representative and his control over him is irretrievably lost.21

<sup>19. 176</sup> NLRB at 798.

<sup>20.</sup> Cox, Some Aspects of the Labor-Management Relations Act, 61 Harv. L. Rev. 1, 5 (1947).

<sup>21.</sup> A penalty imposed upon a supervisor may have a permanent effect and cause substantial economic loss unless it is retracted by the Union. See Du Ross, III, *Limitations Upon Union Discipline, supra*, at 336, with reference to financial and job referral benefits lost by disciplined supervisors. Pension and death benefits were lost by

Consequently, consistent with the legislative history and decisions recounted above, the *amicus* suggests the following rule: A union may not lawfully discipline a supervisor for performing any duties related to his management role, whether or not these duties are connected with the negotiation, interpretation or administration of collective bargaining agreements or the processing of grievances.<sup>22</sup> The rule here suggested is consonant with the mandate of Congress that management's control over his supervisor be unaffected by union ascendancy or obligations.

supervisors in one of the instant cases, Florida Power & Light Co. Moreover, a disciplined supervisor may well have no recourse in law to recover his lost benefits. The Act does not regulate internal Union rules pertaining to eligibility for membership or financial benefits. American Newspaper Publishers Association v. N. L. R. B., 193 F. 2d 782, 800 (CA 7, 1951), cert. denied, 344 U. S. 812 (1952). In addition, supervisors may be precluded from suing in state courts by the doctrine of preemption. Iron Workers Local 207 v. Perko, 373 U. S. 701, 706-708 (1963). Accordingly, to encourage the · Union to relent and remove its penalty, it is wholly reasonable to conclude, as did the Board, that a once disciplined supervisor would align himself with the Union's position during future production or grievance confrontations between the union and his employer. The employer must, therefore, choose between replacing his selected representative or accepting non-representation by him. The court below has erroneously substituted its judgment for that of the N.L.R.B. in an area within the special competence of that agencyinferences to be drawn from facts. Radio Officers Union v. N. L. R. B., 347 U. S. 17, 48-50 (1954); Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 488, 490 (1951).

<sup>22.</sup> It would be unnecessary to establish that the Union's discipline succeeded in requiring the employer to replace the supervisor. *Meat Cutters Local 81* v. *N. L. R. B.*, 458 F. 2d 794, 801 n. 20 (C. A. D. C., 1972).

#### Ш.

A SUPERVISOR IN PERFORMING THE WORK OF STRIKING EMPLOYEES IS EXERCISING A SUPERVISORY RESPONSIBILITY OR FUNCTION AND IS ENGAGED IN THE PROCESS OF COLLECTIVE BARGAINING.

In applying the just enunciated rule to the instant cases, the amicus asserts that supervisors are exercising a vital managerial responsibility when, during a strike, they perform work ordinarily belonging to the striking employes. Retalitory discipline by the union for this performance, therefore, violates the Act.

It is undisputed that a supervisor, while construing an agreement or adjusting a grievance, is acting as a managerial representative. A strike has potentially far graver ramifications for an employer than does the resolution of a grievance or the interpretation of an existing agreement by a supervisor. In addition to likely irreplacable losses of customers and good will, the outcome of the strike determines the nature of the agreement that will both immediately bind the parties and serve as a floor for prospective contracts. Since the employer's ability to withstand the economic tensions of a strike will significantly effect its outcome, it is essential for the employer to marshal all possible forces to produce a favorable result. To this end management has "traditionally relied upon its supervisors to pitch in and perform rank and file work" in order both to enhance its bargaining posture and to diminish the adverse economic repercussions that will necessarily follow in the wake of the strike.23

It is during the critical period of the strike that the supervisor's managerial status and attendant loyalty most benefits his employer; supervisors are likely well acquainted with the duties of the rank and file and thus are the persons most able to immediately step in and support their employer's production and

<sup>23.</sup> NLRB v. Electrical Workers Union 2150, supra; Electrical Workers Locals 641, 622 etc. v. NLRB, supra.

customer service requirements. When supervisors provide their employer with economic leverage during the strike they are performing their management roles just as they are when representing their employer in a grievance dispute. Indeed, insofar as their performance of rank and file work enables their employer to meet his business commitments, their performance is the essence of the managerial function.<sup>24</sup> Consequently, pursuant to the rule previously articulated, union discipline aimed at frustrating this performance violates Section 8(b)(1)(B).

In addition, when an employer utilizes his supervisory staff to carry out assignments normally performed by striking employees, he is employing them directly in the process of collective bargaining, just as he would be if he utilized them to negotiate or administer a contract, since economic force is recognized as part of the bargaining procedure. As this Court has stated: "It is well recognized that the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." <sup>25</sup>

Consequently, when a union penalizes the foreman in an attempt to dissuade him from preserving his employer's interests

<sup>24.</sup> This utilization of supervisory personnel is wholly consonant with the design of Section 8(b)(1)(B), 2(3) and 14(a), which, as previously demonstrated, was to ensure that the employer will have completely loyal supervisors under his control. Congress apparently at least has implicity recognized that an employer has a right to secure strike solidarity among its supervisory employees just as a union may promote this solidarity among its non supervisory members. The Senate Report indicated that in exempting supervisors from the operation of the Act, Congress was concerned about restoring some semblance of a balance of collective bargaining power between unions and employers. The Report found that the organization of supervisors with the resulting rights under the National Labor Relations Act "probably more than any other single factor ha(d) upset any real balance of power in the collecting-bargaining process. . . ." S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947) in I Legis. Hist. at 409. Electric Workers Locals 641, 622, etc. v. NLRB supra.

<sup>25.</sup> NLRB v. Insurance Agents International Union, 361 U.S. 477, 495 (1960).

by performing necessary work during a strike, it directly intrudes upon the employer's statutory right to select and to rely upon supervisory representatives to perform collective bargaining duties during the strike.<sup>26</sup> Thus, when a union punishes a supervisor for performing rank and file work ordinarily belonging to the striking employees, it has contravened the explicit terms of Section 8(b)(1)(B).

#### IV.

# THIS COURT'S ALLIS-CHALMERS DECISION DOES NOT IMMUNIZE THE UNION'S DISCIPLINE FROM THE PROHIBITIONS OF SECTION 8(b)(1)(B).

While the court below relied upon the Allis-Chalmers'<sup>27</sup> case to support its holding, any suggestion that this case has controlling significance must be rejected.<sup>28</sup> This Court has stated that the decision in *Allis-Chalmers* recognized that Congress did not intend Section 8(b)(1)(A) to prohibit the imposition of union fines not otherwise proscribed by the Nation's labor policy.<sup>29</sup>

This policy, as evidenced by the statutory provisions dealing with supervisors, prohibits unions from exerting pressure in order to turn an employer's representatives against him and instead, expressly protects the employer-supervisor relationship. Since union discipline aimed at inducing a supervisor to deviate from his employer's position contravenes this policy, the rationale underpinning *Allis-Chalmers* does not serve to immunize the

<sup>26.</sup> The effect of union discipline is, of course, not limited to the punished supervisor. Other foremen, though not penalized, will be wary of offending the union while performing their managerial duties.

<sup>27.</sup> NLRB v. Allis Chalmers Mfg. Co., 388 U. S. 175.

<sup>28.</sup> Electrical Workers Local 2150 (Wisconsin Electric Power Co., supra.

<sup>29.</sup> In Schofield v. NLRB 394 U. S. 423, 430 (1960) thus Court stated that the Allis-Chalmers rationale only permits "a union \*\*\* \* to enforce a properly adopted rule which reflects a legitimate union interest (and) impairs no policy Congress has imbedded in the labor laws."

union's discipline in the instant cases from the proscriptions of Section 8(b)(1)(B).

The court below, relying upon Allis-Chalmers, failed to recognize that this Court's decision there considered only a situation where the union disciplined employee-members. In this context, this Court acknowledged generally the union's power to discipline these employees in order to preserve its status as an effective bargaining agent.

Here, the issue involves discipline not of employees but rather of *supervisors* who are clearly and indisputably part of management. As demonstrated above, the employer's right to rely upon and to control his supervisory staff is paramount and this right cannot be limited by any obligations their supervisors may owe to the union. Consequently, where the right of an employer to have loyal supervisors under his control clashes with the desire of a union to promote strike solidarity, the former must prevail.

#### CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed and the Board's orders enforced.

Respectfully submitted,

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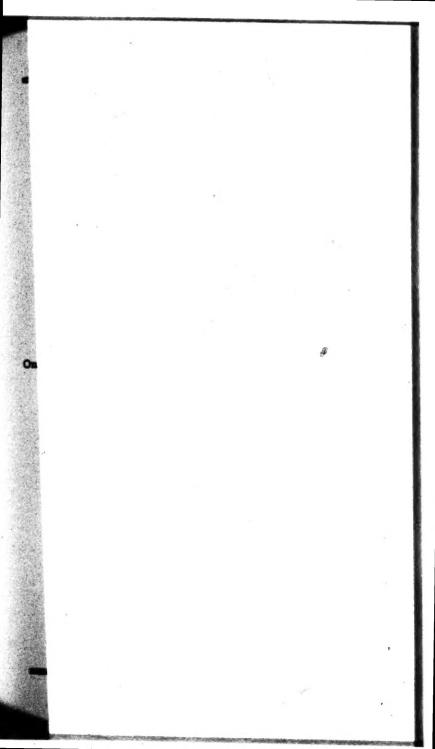
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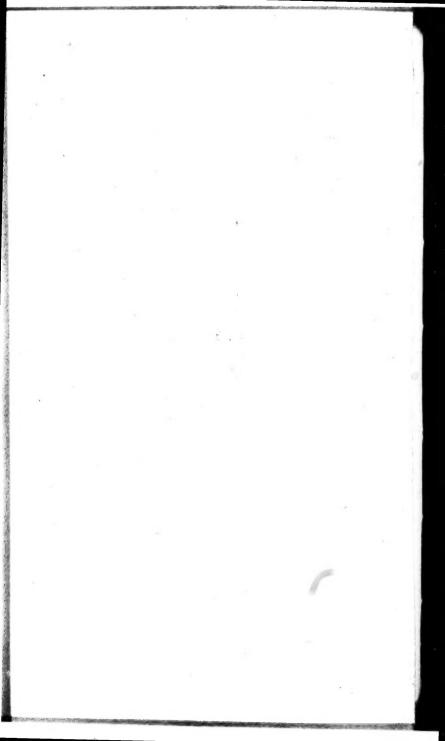
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TICHAEL BOOM, JR., CLERK

#### IN THE

## Supreme Court of the United States

OCTOBER TERM, 1973

FLORIDA POWER & LIGHT COMPANY, Petitioner

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL., Respondents

NATIONAL LABOR RELATIONS BOARD, Petitioner

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

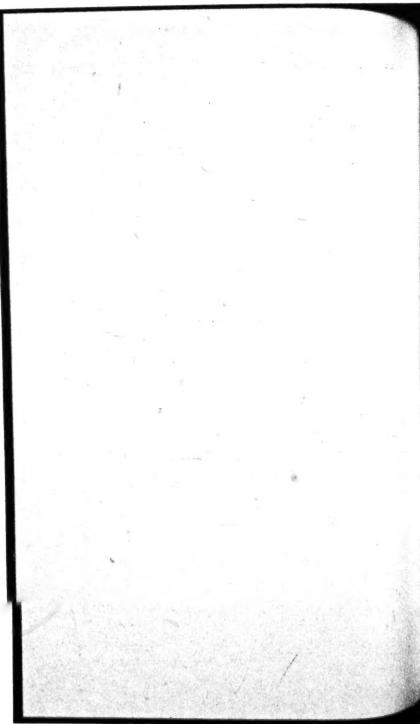
#### MEMORANDUM IN OPPOSITION TO MOTION OF CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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#### IN THE

## Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-556 and 73-795

FLORIDA POWER & LIGHT COMPANY, Petitioner v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL., Respondents

NATIONAL LABOR RELATIONS BOARD, Petitioner

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

#### MEMORANDUM IN OPPOSITION TO MOTION OF CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

1. On April 16, 1974, the Chamber of Commerce filed a motion for leave to file a brief amicus curiae in these consolidated cases. As the motion states, the Chamber supports the position of the Petitioners, whose respective briefs were filed on March 8 and 13,

- 1974. Under Rule 42(2), the Chamber's brief amicus curiae was also due no later than March 13. Instead, it was filed 34 days later. This, perhaps coincidentally, was the day after the Union Respondents' brief in these cases was due and filed. The result is: first, that the brief tendered by the motion is untimely under this Court's rules; and, second, that as a result the Union Respondents have been given no opportunity (much less the full opportunity contemplated by Rule 42(2)) to reply to the Chamber's submission.
- 2. The foregoing would be grounds enough for denying the present motion. But there is more. The Chamber is, of course, on notice of Rule 42, which it cites in its motion. Moreover, on April 9, 1974, the undersigned counsel advised the Chamber's counsel that, because it would be out of time, the Union Respondents would object to the filing of a brief amicus curiae by the Chamber. (Letter of April 9, 1974 from Laurence J. Cohen to the Clerk of this Court, a copy of which was sent to counsel for the Chamber.) Nevertheless, the present motion seeks only leave to file, not also leave to file out of time, and does not even deal with, much less attempt to excuse, the Chamber's delay.

The circumstances surrounding the April 9 letter are as follows: On April 3, 1974, Ray C. Muller, Esquire, Counsel for Florida Power and Light, Petitioner in No. 73-556, advised the Clerk of this Court that he had received a request from the Chamber for his consent to file a brief as amicus curiae and that he was giving his consent "pursuant to Rule 42 of the Court." A copy of his letter was sent to counsel for the Union Respondents. Thus, counsel for the Chamber knew well before they actualy filed the present motion and

accompanying brief that they would do so. But no such request was made of the Union Respondents. Thus, the Chamber did not even advise the party most affected of its intent, and it was only through the copy of Mr. Muller's letter to the Clerk that the undersigned first learned that the Chamber contemplated filing such a brief. And, the Chamber took no subsequent action (such as providing page proof) to mitigate the adverse effects of its noncompliance with the Rules.

- 3. The Union Respondents as parties to this litigation, and the undersigned counsel as officers of this Court, welcome briefs amicus curiae, since they serve to assure that this Court is fully advised as to all of the ramifications of the issues to be decided. We therefore gave consent to the filing of a timely brief amicus curiae in support of Petitioners by the Graphic Arts Union Employers of America. But the decisionmaking process as it manifests itself in litigation is of an adversary character. And to further the the search for truth in a manner consistent with the adversary system, this Court's rules contemplate that each side will have the opportunity to make full response to the arguments presented by the other. doubtless for this reason that Rule 42(2) provides that a brief amicus curiae on the merits shall be "presented within the time allowed for the filing of the brief of the party supported." Thus, to allow an amicus curiae to file a brief when that of the party-opponent is in preparation, or, a fortiori, when it is already filed, undermines the process which this Court's rules envisage. And it is utterly unfair to the opposing party, such as the Union Respondents herein.
- 4. Finally, we must advise the Court that the Chamber's flouting of Rule 42(2) in this case, while

sufficiently serious by itself to require denial of the motion, is not an isolated lapse. The submission of briefs amicus curiae out of time has become a way of life with Chamber. In at least the following cases during the present Term, the Chamber has submitted briefs amicus curiae which were substantially (more than two weeks) out of time: No. 72-1554, Super Tire v. McCorkle (21 days late); No. 73-235, DeFunis v. Odegaard (34 days late); No. 73-631, Howard Johnson Co. v. Detroit Local Joint Executive Board, etc. (24 days late): No. 73-640, Gduldia v. Aiello (31 days late). Moreover, in at least one recent case of which we are aware this Court has denied a motion by the Chamber "for leave to file an untimely brief, as amicus curiae." (Cleveland Board of Education v. LaFleur, and Cohen v. Chesterfield City School Board, 414 U.S. 905.

For the foregoing reasons, the Motion by the Chamber of Commerce for Leave to File an Amicus Curiae Brief should be denied.

#### Respectfully submitted,

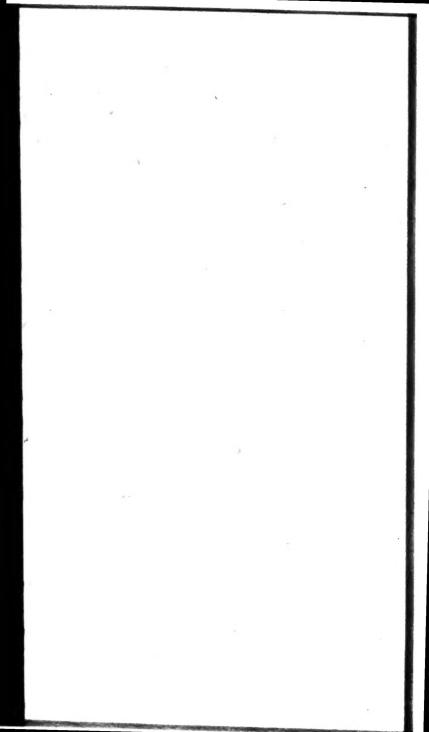
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# Supreme Court of the United States October Term, 1973

## No. 73-556

FLORIDA POWER & LIGHT COMPANY, Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL, Respondents.

## No. 73-795

NATIONAL LABOR RELATIONS BOARD, Petitioner,

Workers, AFL-CIO, et al., Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

# BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief amicus curiae, in support of the position of the the union-respondents, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately

13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

## ARGUMENT

1. In the instant cases the National Labor Relations Board seeks this Court's approval for the agency's view that it is an unfair labor practice proscribed by §8(b)(1)(B) for a union to discipline a supervisor who is its member for performing bargaining unit work during a strike. The asserted statutory source of this prohibition provides that it is an unfair labor practice for a union or its agent "to restrain or coerce,"

"an employer in the selection of his representatives for the purposes of collective pargaining or the adjustment of grievances; " """

This language does not readily lend itself to the Board's interpretation. Nor do the authoritative Congressional explanations: e.g., under  $\S 8(b)(1)(B)$ 

"a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." (S. Rep. No. 105 on S. 1126,80th Cong., 1st Sess., p. 21; 1 Legislative History of the Labor Management Relations Act, 1947, p. 427, hereafter cited as "Leg. Hist.")

To circumvent these impediments in its path, the Board

first argues that the result it reached in this case is justified by the "evolution of the Board's interpretation of §8(b)(1)(B)" (Bd. Br. p. 18, caps omitted), relying on a line of cases begun in 1968 (over 20 years after the enactment of that Section). (See Bd. Br. pp. 18-27.) But as the Chief Justice has recently reminded, while the circumstance that a holding is at the end of "a chain of evolutionary developments \* \* \* [and] appear[s] a reasonable step in relation to that which preceded it" is sufficient to lend it "seductive plausibility," it is insufficient to warrant its approval "where the aggregate or end result is one that would never have been seriously considered in the first instance." (United States v. 12 200-Ft, Reels of Film, 413 U.S. 123, 127.) Therefore it is not necessary to determine at which point the Board made its first misstep; it suffices to show that the Board's holding in the present cases does not accord with the overall scheme of the Act. §8(b)(1)(B)'s language, or the legislative history which further informs our understanding of the Congressional intent.

2. The error of the Board's view of the scope of §8(b) (1)(B) appears most clearly when it is contrasted with the narrow role envisaged by Congress for that provision. Both the statutory language and the amplification on that language in the Senate Report (just set out at p. 2), as well as the floor statements by Senators Taft and Ellender that constitute the remainder of the record, evince a determination that to further perfect the process of collective bargaining delineated in §8(d), and the process of grievance

<sup>&</sup>lt;sup>1</sup> See 93 Cong. Rec. 3838; 2 Leg. Hist. p. 1012, and 93 Cong. Rec. 4143; 2 Leg. Hist. p. 1077.

dispute settlement approved in §§ 203 & 204, (these three provisions were also added to the Act in 1947), it is necessary to assure that management is free to choose its spokesmen without being subject either to union refusals to meet or to strike action. Indeed, the Senate Report makes it plain that the major purpose of §8(b)(1)(B) is to protect employers from being "coerce[d] into joining or resigning from an employer association." In this respect, the Section represents a more restrained approach to the problem of multi-employer bargaining than that which had been proposed by the House. Section 9(f)(1) of H.R. 3020 would have outlawed multi-employer bargaining; 2 but the Senate, and eventually Congress, provided that employers and unions should retain the privilege to engage in such bargaining by voluntary mutual agreement.3 The secondary function of  $\S 8(b)(1)(B)$ , and the one with which we are here concerned, furthers the overall purpose just described by "also" prohibiting union "dictat[ion of] who shall represent an employer," (S. Rep. No. 105, 80th Cong., 1st Sess., p. 21; 1 Leg. Hist., p. 427).

But there is not a word in §8(b)(1)(B) or its history that even suggests a Congressional intent to empower the Board to go beyond regulation of the bargaining process and to enter the entirely distinct and highly sensitive area of the use of economic weapons during a lawful strike. (Compare

<sup>&</sup>lt;sup>2</sup> See House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess. pp. 8-9, 56; 1 Leg. Hist. pp. 299-300, 347.

<sup>&</sup>lt;sup>3</sup> Compare §§ 2(3), 2(11) & 14(a) discussed at pp. 5-7 infra, in which, as we demonstrate, Congress chose to reinstate the employer's privilege to discharge supervisors for union membership or union activity rather than enacting new federal prohibitions.

Labor Board v. Insurance Agents, 361 U.S. 477 and Labor Board v. Driver' Local Union, 362 U.S. 274, discussed at pp. 14-18 infra.) And of course, disciplining a supervisor-member who performs rank-and-file work during a strike is the union's counterpoise to the employer's use of his supervisors to break the strike. Nor is there a word in §8(b) (1)(B) or its history suggesting that Congress, despite its determination to continue to allow unions to exercise their historic right to discipline rank-and-file members who work during a strike, intended to prohibit such discipline of supervisor-members. (Compare NLRB v. Allis-Chalmers, 388 U.S. 175 and NLRB v. Boeing Co., 412 U.S. 67 discussed at pp. 9-10 infra.)

3. The Board purports to provide a statutory justification for its conclusion here by arguing that in 1947 "Congress" dominant objective [was to] insure the employer the undivided loyalty of his supervisors," and that the Board's reading of §8(b)(1)(B) "effectuates [that] objective." (Bd. Br. p. 31). But, as we now show, while recognition was given in 1947 to the employer interest in a supervisory force which owes undivided loyalty to the employer, that end was advanced, not by creating an unfair labor practice in §8(b) (1)(B), but by providing the employer a privilege to discharge supervisors because of their union membership or union activity. This was accomplished by amending the definition of "employee" in § 2(3) to exclude those denominated 'supervisors' in &2(11), and by providing in &14(a)that while "nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization," no employer "shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Thus, Congress protected employers by reserving in them the privilege to discharge, or not to hire, supervisors who are union members, and to refuse to bargain about supervisors' wages, hours and working conditions. But Congress did not afford employers the added protection of making it an unfair labor practice, enforceable by Board sanctions, for supervisors to be union members (see *Labor Board v. News Syndicate*, 365 U.S. 695, 699), or for unions to exercise their traditional authority over their members, by disciplining supervisor-members (like rank-and-file members) for strikebreaking.

(a). In Packard Motor Co. v. Labor Board, 330 U.S. 485 (1947), this Court, agreeing with the Board, answered in the affirmative the question, "whether foremen are entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities as assured to employees generally by the National Labor Relations [Wagner] Act," (id. at 487).

The 1947 Congress regarded that "recent development \* \* \* [viz.] the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel," as one which would "deprive \* \* \* management \* \* \* of the undivided loyalty of its foremen \* \* \* unless this Congress takes action." (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 3, 5; 1 Leg. Hist., pp. 409, 411.) The "action" recommended by the Senate Labor Committee, and by the House Labor Committee as well, and adopted by Congress, was directly responsive to the Packard Motor Co. decision:

as already noted the term "employee" in §2(3) was redefined to exclude "supervisors," a class which was delineated in a new § 2(11); additionally, Congress adopted § 14(a) which established that neither the NLRB nor any state agency could afford supervisors the status of "employees." On the other hand, Congress did not make it unlawful for supervisors to join unions or for employers to accept their doing so; indeed, §14(a) provides also that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization." In sum, Congress "relieve[d] employers \* \* \* free of any compulsion by this national Board or any local agency to accord to the front line of management the anomalous status of employees" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 5; 1 Leg. Hist., p. 411), and thereby reinstated the employer's previously recognized privilege "to discharge \* \* \* foremen for union activity," (93 Cong. Rec. 3836; 2 Leg. Hist., p. 1008; remarks of Sen. Taft).

In its memorandum amicus curiae in Beasley v. Food Fair (No. 72-1597, this Term), the Board accurately summarizes the scope and rationale of  $\S$  2(3), 2(11) and 14(a):

"These amendments were designed to provide a solution to the conflict-of-loyalty problem created by the unionization of supervisors. Supervisors were free to join unions and to bargain through them if the employer was willing; on the other hand, the employer could insist that his supervisors not join unions and discharge them if they did." (Bd. Mem. in No. 72-1597, p. 6.)

<sup>&</sup>lt;sup>4</sup> It is particularly instructive to compare the Board's *Beasley* memorandum (at pp. 5-12), where § 14(a) is regarded to be of

The discussions of §§ 2(3), 2(11) & 14(a) are the only ones which advert to a Congressional desire "to insure the employer the undivided loyalty of his supervisors," (Bd. Br. p. 31). And there is nothing in those discussions to support the Board's view that Congress' "solution" to this "conflict of loyalty problem" (Bd. Mem. in No. 72-1597, p. 6), encompassed the creation of an unfair labor practice prohibiting union discipline of supervisor-members for strike-breaking.

(b). As this Court observed in NLRB v. Allis-Chalmers, 388 U.S. at 181-182, the 1947 Congress was well aware that "[p]rovisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, \*\*\* were commonplace at the time of the Taft-Hartley amendments." Moreover, in explaining why supervisors were being deprived of the status of employees the House Report observed that leading foremen's union, the Foremen's Association of America, had, in order to obtain the support of the rank-and file for strikes by its foremen-members, "adopted a formal 'policy' forbidding its members, when the rank-and-file unions strike, to enter the struck plants and protect and maintain them without the consent of the rank-and-file unions." (H. Rep. No. 245, 80th Cong., 1st Sess., pp. 15-16; 1 Leg. Hist., pp. 306-307, emphasis in original.) It was thus understood that union membership of supervisors diminishes the employer's ability to use supervisors as strikebreakers.

controlling importance, with its brief in this case (at pp. 31-32), where it attempts to deprive that section of all significance. Indeed, the understanding of § 14(a) expressed by the court below, which the Board seeks to rebut at this point in its brief, accords with the Board's own reasoning in *Beasley*.

But Congress was not willing to press the principle of "insuring the employer the undivided loyalty of his supervisors" (Bd. Br. p. 31), to the extent of enacting a prohibition against supervisors' union membership or of limiting the right of unions to discipline their supervisor-members for strikebreaking.

The first of these solutions would have further sharpened the division between the proponents of legislation to reverse the Packard Motor Co. decision and those who desired to safeguard the right of supervisors to join and form unions. One of the grounds for the veto of the Case bill, the predecessor of the 1947 amendments to the Wagner Act, had been the 1946 Congress' restrictions on supervisors' union membership.<sup>5</sup> So, too, in 1947, the minority in both the House and Senate Labor Committees attacked §§ 2(3), 2(11) & 14(a) for withdrawing from supervisors the right even to form and join their own (if not rank-and-file) unions.<sup>6</sup>

The second alternative, and the one advocated by the Board herein, would have conflicted with the desires of both the majority and the minority to minimize interference with the internal affairs of unions, see the discussion in *Allis-Chalmers*, supra, 388 U.S. at 184-195, from which this Court concluded:

"What legislative materials there are dealing with  $\S 8(b)(1)(A)$  contain not a single word referring to the

<sup>&</sup>lt;sup>5</sup> H.R. 4908, 79th Cong., 2nd Sess. President Truman's veto message is set out at 92 Cong. Rec. 6674; the issue of supervisors' union membership is discussed *id.* at 6677.

<sup>&</sup>lt;sup>6</sup> H. Min. Rep. No. 245 80th Cong., 1st Sess., pp. 71-72; 1 Leg. Hist., pp. 362-363; S. Min. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., pp. 39-40; 1 Leg. Hist. pp. 501-502.

application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in pricular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions." (388 U.S. at 185-186 quoted with approval and followed in NLRB v. Boeing Co. 412 U.S. at 73; emphasis in the latter.)

Thus, in the context of "a predictable Presidential veto" (cf. Pipefitters v. United States. 407 U.S. 385, 409), a more radical proposal than changing the statutory status of supervisors, such as creating a federal prohibition either against supervisors' union membership, or against union discipline of supervisor-members for strikebreaking, would have endangered the delicate political balance required by the anticipated need to secure a two-thirds majority in both houses if the bill were to become law. The sponsors of the 1947 amendments were therefore content to restore the relationship between employers and supervisors to that

<sup>&</sup>lt;sup>7</sup> In NLRB v. Marine and Shipbuilding Workers, 391 U.S. 418. 424, the Court stated that "§ 8(b)(1)(A) assured a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play." As the sole example of union discipline to further "its legitimate internal affairs," Mr. Justice Douglas cited Allis-Chalmers, which he described as having held "that §8(b)(1)(A) does not prevent a union from imposing fines on members who cross a picket line created to implement an authorized strike." (Id.) Thus, there can be no doubt that Marine Workers was not intended to sanction Board regulation of union discipline of members for strikebreaking on the theory that such discipline like expulsion for filing a charge does not concern "its legitimate internal affairs." The Board's reliance on Marine Workers (Bd. Br. pp. 45-46), in this case is therefore entirely misplaced.

which had obtained before the Wagner Act; they did not choose to take the additional risk entailed in giving affirmative protection to the employers against conflicting supervisory loyalties.

Further evidence that § 8(b)(1)(B), in particular, was not intended to deal with the controversial "conflict-of-loyalty" issue, is that this Section is unique among the Senate bill's proposed union unfair labor practices in achieving the approval of the minority both as to the end sought and the means utilized to secure that end. This was undoubtedly due to its carefully delineated language, whose narrow meaning was confirmed by the Senate Report. The understanding at the time is highlighted by Senator Taft's floor explanation of § 8(b)(1)(B) which tracked the Section's language and was introduced by his statement that "[t]his unfair labor practice referred to is not perhaps of tremendous importance • •," (93 Cong. Rec. 3954; 2 Leg. Hist., p. 1912). Cf. Pipefitters v. United States, 407 U.S. at

<sup>8</sup> See S. Min. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., pp. 40-41;
1 Leg Hist., pp. 502-503, describing this provision as one of the "Acceptable Provisions of the [Senate] bill."

<sup>9</sup> Senator Taft stated :

<sup>&</sup>quot;This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.' This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, 'we will not bargain with you unless you appoint your national employers' association as your

409, where this Court said that Senator Taft's "view of the limited reach of" a different provision, "entitled in any event to great weight, is in this instance controlling." 10

The Board's conception of  $\S 8(b)(1)(B)$  attributes to Senator Taft, and his colleagues who were responsible for drafting and explicating the Senate bill a cynical disingenuousness never attributed to them even by their open opposition. For, its operative premise is that while the proponents stated that they had focussed on and met the problem of conflicting supervisory loyalty in  $\S\S 2(3)$ , 2(11) & 14(a), and never adverted to that problem in connection with  $\S 8(b)(1)(B)$ , their true purpose in the latter provision was to go beyond the employer privilege they had reinstated by the acknowledged reversal of the *Packard Motor Co.* decision.

If Senator Taft is credited, what he would not say during the debates is also pregnant with significance. His explanation of §§ 2(3), 2(11) & 14(a) made it plain that the Senate bill did not retain any statutory protections for supervisors. The removal of all such protections was the means,

agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes."

<sup>10</sup> For Senator Taft's limiting construction: of § 8(b)(1)(A), see Drivers' Local Union, supra, 362 U.S. at 287-288 and Allis-Chalmers, supra, 388 U.S. at 185-190; of the damage remedy provided by § 303, see Teamsters Union v. Morton, 377 U.S. 252, 260 n. 16; of the reach of § 8(b)(6), see ANPA v. Labor Board, 345 U.S. 100, 106-111; and of the regulation of union political activity by 18 USC § 610, see Pipefitters cited in the text.

as we have seen, by which employers were to be assured the "undivided loyalty" of their supervisors. It is, therefore, utterly anomalous for the Board to argue in support of a construction of  $\S 8(b)(1)(B)$  which would give employers a greater protection than Congress contemplated, that this construction would also protect the interests of supervisors, (Bd. Br. pp. 41-42).

(c). The short of the matter is that the elaborate policy arguments advanced by the Board in its decisions herein and in its arguments to this Court do not "reconstitute the gamut of values at the time that the [statutory] words were uttered"; 11 they rebel against them. Very much in point, therefore, is Mr. Justice Harlan's criticism in Machinists v. Labor Board, 362 U.S. 411, 428, of an earlier Board's refusal to hew to the lines Congress drew:

"We think this analysis inadmissible for the reason that the accommodation between these competing factors has already been made by Congress. It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. Cf. Note 7 [362 U.S. at 425]."

Here it "may be asserted, without fear of contradiction, that the interest in [undivided loyalty of supervisors to employers] is one of those given large recognition by the

<sup>&</sup>lt;sup>11</sup> Woodwork Mfrs. Assoc. v. NLRB, 386 U.S. 612, 620 (quoting L. Hand, J.).

Act as amended." (Id.) But here, too, it is impermissible to disregard the "competing interests." (Id.) The Board's decisions in these cases disrespect the "totality of [the] adjustment" which Congress made; they provide to this particular employer interest an implementing force—the Board's unfair labor practice sanctions—with which it was not endowed by Congress, and protect perceived interests of supervisors which Congress, rightly or wrongly, did not recognize. Once again, "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy \* \* \*," (Machinists, supra, 362 U.S. at 429.)

4. We have seen thus far that § 8(b)(1)(B) was enacted to safeguard the right of employers to bargain and settle grievances through representatives of their own choosing and that the Board has wrenched that provision out of context in order to grant an additional protection (not provided by Congress) to the employer who wishes to meet a strike by having his supervisors do rank-and-file work, and to deprive the union of a countervailing economic weapon—discipline of its supervisor-members—otherwise available. This is not the first time the Board has misused one of the "five specific practices by labor organizations" that Congress determined "should be defined as unfair labor practices" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, 1 Leg. Hist., p. 414), in order to implement the agency's own views as to the validity of certain economic weapons.

In Insurance Agents, supra, 361 U.S. 477, the question presented was whether the Board, as it claimed, was:

"authorized under the Act to hold that \* \* \* certain planned concerted on-the-job activities designed to

harass the company \* \* \* which the Act does not specifically forbid but Sec. 7 does not protect, support a a finding of a failure to bargain in good faith as required by Sec. 8(b)(3)." (Id. at 480, 482-483; footnotes omitted.)

This Court held that the Board had no such authority. In so doing, Mr. Justice Brennan emphasized:

"[I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." (Id. at 490.)

That being so the Court disagreed with the Board as to the extent to which the agency was free to adjudge union activity not affirmatively protected by the Act to be an unfair labor practice:

"The Board suggests that since " the union members' activities here were unprotected, and they could have been discharged, the activities should also be deemed unfair labor practices, since thus the remedy of a cease-and-desist order, milder than mass discharges of personnel and less disruptive of commerce, would be available. The argument is not persuasive. There is little logic in assuming that because Congress

was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law. Our problem remains that of construing §8(b)(3)'s terms, and we do not see how the availability of self-help to the employer has anything to do with the matter." (1d. at 495.)

Yet, in the instant cases the Board seeks to supplant the use of "self-help • • • [which] Congress was willing to allow employers" by reversing the *Packard Motor Co.* decision, through the device of making it an unfair labor practice for a union to discipline supervisor-members for strukebreaking.

Insurance Agents is additionally instructive in that the fourt there stated the limits of the deferrence due to the Hourd's expertise:

Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked. We see no indication here that Congress has put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining." (Id. at 499-500.)

The analysis developed thus far demonstrates that here as in that case the Board has sought to answer a question that Congress has not asked of it.

The Board's misinterpretation of §8(b)(1)(B) is also parallel to the unwarranted expansion of §8(b)(1)(A) checked in *Drivers' Local Union*, supra, 362 U.S. 274. There the Board had held that

"peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the employees' exclusive bargaining agent, is conduct of the union 'to restrain or coerce' the employees in the exercise of rights guaranteed in  $\S$ 7, and thus an unfair labor practice under  $\S$ 8(b)(1)(A)." (Id. at 275.)

This Court reversed. Mr. Justice Brennan, again writing for the Court, noted that the Board's lack of authority to regulate economic weapons without a particularized statutory mandate as stated in *Insurance Agents* embodied the central lesson of § 13, which:

"declares a rule of construction which cautions against an expansion reading of [one of the unfair labor practice provisions] which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute." (Id. at 282.)

And, he returned to a point also central to the Insurance Agents' decision:

"The Board asserts that the very general standard in §8(b)(1)(A) vests power in the Board to sit in judgment upon, and to condemn, a minority union's resort to a specific economic weapon, here peaceful picketing. The structure of §8(b), which defines unfair labor practices, hardly supports the Board's claims. Earlier this Term we pointed out that 'Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions.'" (Id. at 282-283.)

Here, the expansion of the second subdivision of § 8(b)(1) attempted by the Board does equal violence to a limited

prohibition enacted by Congress. And, again, the extension essayed by the Board has the effect of restricting the right to strike and to utilize kindred peaceful economic weapons guaranteed by § 13.<sup>12</sup>

5. The Board's decisions in the first twenty years after the adoption of the Taft-Hartley amendments confirmed Senator Taft's evaluation that §8(b)(1)(B) "is not perhaps of tremendous importance." In 1960 the Board was able to advise the Second Circuit that only 11 cases under §8(b)(1)(B) had thus far arisen. This paucity of cases was due to the Board's confining that provision to its intended reach; it can not have been because unions did not discipline their supervisor-members or because employers did not utilize supervisors to perform rank-and-file work during strikes.

The furthest that the Board would go in those days was to assert that a union violates § 8(b)(1)(B) by striking for a clause which would require foremen who handle grievances to be members of the union; the Board's position ultimately prevailed in this Court by a 4-4 affirmance of the First Circuit. Typographical Union v. Labor Board, 365 U.S. 705, affirming by an equally divided court, 278 F.2d 6, 11-13 (C.A. 1). In the support of that position the Board took

<sup>12</sup> In both Insurance Agents and Drivers' Local Union, the Board's freewheeling regulation of economic weapons resulted in an advantage for employers. That, however, has not always been the case. See e.g., American Shipbuilding Co. v. Labor Board, 380 U.S. 399; Labor Board v. Brown, 380 U.S. 278.

<sup>&</sup>lt;sup>18</sup> Brief for the NLRB in NLRB v. Local 294 Teamsters (C.A.2 No. 26,224) p. 16. (The Court of Appeals decision is reported at 284 F.2d 893.) Of these, 5 concerned multi-employer bargaining.

pains to bring its view within the statutory language and the purpose stated in the Senate report: the Board contended that a requirement of union membership for foremen would prevent employers from selecting those individuals who were not, or did not wish to remain, union members. Yet, under the agency's present conception of  $\S 8(b)(1)(B)$  the *Typographical Union* case would have been a simple one.

It was not until 1968, when the Board took what is admittedly a broader view of §8(b)(1)(B), that litigation under this Section began to burgeon and this hitherto unimportant unfair labor practice came to assume substantial dimensions. We have stated at the outset that it is not our task to demonstrate that San Francisco-Oakland Mailers, 172 NLRB 2173 (hereafter "Oakland Mailers"), or any of its progeny, before the present cases, reached the wrong result. But it does bear emphasis in light of the importance the Board attaches to the "evolutionary process" by which the decisions herein were reached (Bd. Br. p. 18), that this evolution commenced not when the Act was born, but when it had almost reached voting age. Moreover, the "specialized experience" (Bd. Br. p. 39), which avowedly underlies the present decision is not industrial experience, either in the years before Oakland Mailers or in the relatively short period thereafter; it is not even "experience" in the form of a new insight into the original understanding of §8(b)(1)(B) resulting from collateral developments in the law, (cf. Boys Market v. Retail Clerks, 398 U.S. 235). The only "experience" that has been

<sup>14</sup> Brief for the NLRB in No. 340, Oct. Term 1960, p. 39.

brought to bear by the Board in these cases is in the manipulation of the concepts and policies introduced into §8(b)(1)(B) in Oakland Mailers. How little that is worth appears from the inability of the Board to reconcile the view it took of the Allis-Chalmers case in Oakland Mailers with its decisions herein, as well as from the other inconsistencies between these decisions and their predecessors, as set forth in the majority opinion below and in the brief for the union-respondents, (see pp. 28-45, 49-55 of that brief).

Surely, then, the Board's construction of § 8(b) (1) (B) in the present cases derives no support from its origins in recent administrative history. On the contrary, if in a case where the direct evidence of legislative intent points uniformly to a single result the more indirect evidence of administrative interpretation is to be given any weight, it is the narrower interpretation which prevailed in the first twenty years which merits consideration. "Not lightly vacated is the verdict of quiescent years." 15

<sup>&</sup>lt;sup>15</sup> Coler v. Corn Exchange Bank, 250 N.Y. 136, 141; 164 N.E. 882, 884 (Cardozo, J.).

### CONCLUSION

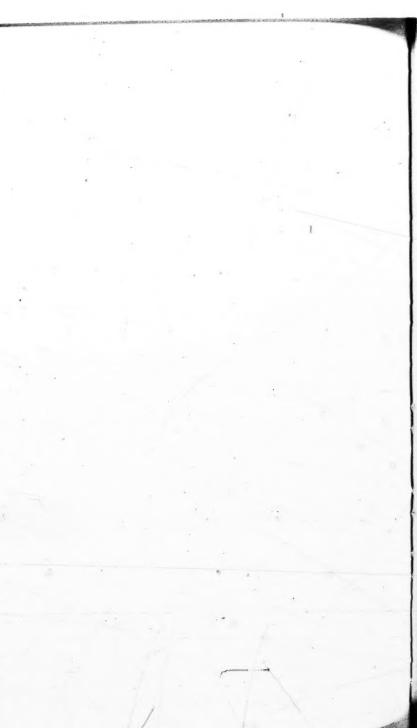
For the foregoing reasons as well as those stated by the union-respondents, the decision below should be affirmed.

Respectfully submitted,

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April, 1974.



NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## FLORIDA POWER & LIGHT CO. v. INTERNA-TIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET. AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-556. Argued April 24, 1974-Decided June 24, 1974\*

A union does not commit an unfair labor practice under § 8 (b) (1) (B) of the National Labor Relations Act (NLRA) when it disciplines supervisor-members for crossing a picket line and performing rank-and-file struck work during a lawful economic strike against the employer. Pp. 7-23.

(a) Both the language and legislative history of § 8 (b) (1) (B) reflect a clear congressional concern with protecting employers in the selection of representatives to engage in two particular and explicitly stated activities, viz., collective bargaining and adjustment of grievances. Therefore, a union's discipline of supervisormembers can violate § 8 (b) (1) (B) only when it may adversely affect the supervisors' conduct in performing the duties of, and acting in the capacity of, grievance adjusters or collective bargainers, in neither of which capacities the supervisors involved in these cases were acting when they crossed the picket lines to perform rank-and-file work. Pp. 12-15.

(b) The concern that to permit a union to discipline supervisor members for performing rank-and-file work during an economic strike will deprive the employer of those supervisors' full loyalty, is a problem that Congress addressed, not through § 8 (b) (1) (B), but through §§ 2 (3), 2 (11), and 14 (a) of the NLRA, which, while permitting supervisors to become union members, assure the

<sup>\*</sup>Together with No. 73-795, National Labor Relations Board v. International Brotherhood of Electrical Workers, AFL-CIO, et al., also on certiorari to the same court.

## п FLORIDA POWER & LIGHT v. ELECTRICAL WORKERS

### Syllabus

employer of his supervisors' loyalty by reserving in him the rights to refuse to hire union members as supervisors, to discharge supervisors for involvement in union activities or union membership, and to refuse to engage in collective bargaining with supervisors. Pp. 15-23.

— U. S. App. D. C. —, 487 F. 2d 1143, affirmed.

STEWART, J., delivered the opinion of the Court, in which Douglas, Brennan, Marshall, and Powell, JJ., joined. White, J., filed a dissenting opinion, in which Burger, C. J., and Blackmun and Rehnquist, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

Nos. 73-556 AND 73-795

Florida Power & Light Co., Petitioner,

73-556 v.

International Brotherhood of Electrical Workers, Local 641, 622, 759, 820, and 1263, et al.

National Labor Relations
Board, Petitioner,
73-795 v.
International Brotherhood
of Electrical Workers,
AFL-CIO, et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 24, 1974]

Mr. JUSTICE STEWART delivered the opinion of the Court.

Section 8 (b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union "to restrain or coerce... an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The respondent unions in these consolidated cases called economic strikes against the employer companies. During the strikes, supervisory employees of the companies, some of whom were members of bargaining units and some of whom were not, but all of whom were union members, crossed the picket lines and performed rank and file struck work, i.e., work normally performed by the nonsupervisory em-

ployees then on strike. The unions later disciplined these supervisors for so doing. The question to be decided is whether the unions committed unfair labor practices under §8(b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and performing rank and file struck work during lawful economic strikes against the companies.

#### T

Since 1909, Local 134, International Brotherhood of Electrical Workers, AFL-CIO, one of the respondents in No. 73-795, has been recognized by the Illinois Bell Telephone Company [Illinois Bell] and its predecessors as the exclusive bargaining representative for both rank and file and certain supervisory personnel, including General Foremen, P. B. X. Installation Foremen, and Building Cable Foremen. Rather than exercise its right to refuse to hire union members as supervisors, the company agreed to the inclusion of a union security clause in the collective-bargaining agreement which required that these supervisors, like the rank and file employees. maintain membership in Local 134. In addition, the bargaining agreement in effect at the time of this dispute contained provisions for the conditions of employment and certain wages of these foremen.

Other higher ranking supervisors, however, were neither represented by the union for collective-bargaining purposes nor covered by the agreement, although they were permitted to maintain their union membership.

<sup>1</sup> Under a Letter of Understanding signed by Illinois Bell and Local 134 in 1954 and reaffirmed in 1971, it was provided that:

<sup>&</sup>quot;As District Installation Superintendents and District Construction Supervisors their wages and conditions of employment will not be a matter of union-management negotiations but they will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and

By virtue of that membership, these supervisors, like those within the bargaining units, received substantial benefits, including participation in the International's pension and death benefit plans and in group life insurance and old age benefit plans sponsored by Local 134.

Under the International's constitution, all union members could be penalized for committing any of 23 enumerated offenses, including "working in the interest of any organization or cause which is detrimental to, or opposed to, the I. B. E. W.," and "working for any individual or company declared in difficulty with a [local union] or the I. B. E. W."

Between May 8, 1968, and September 20, 1968, Local 134 engaged in an economic strike against the company. At the inception of the strike, Illinois Bell informed its supervisory personnel that it would like to have them come to work during the stoppage but that the decision whether or not to do so would be left to each individual, and that those who chose not to work would not be penalized. Local 134, on the other hand, warned its supervisor-members that they would be subject to disciplinary action if they performed rank and file work during the strike. Some of the supervisor-members crossed the union picket lines to perform rank and file struck work. Local 134 thereupon initiated disciplinary proceedings against these supervisors, and those found guilty were fined \$500 each. Charges were then filed with the

insurance benefits as a résult of their membership in the uinon. However, any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personel."

<sup>&</sup>lt;sup>2</sup> Local 134 also imposed fines of \$1,000 each upon each of the five supervisors who had formed the Bell Supervisors Protective Association.

Board by the Bell Supervisors Protective Association, an association formed by five supervisors to obtain counsel for and otherwise protect the supervisors who worked during the strike. The Board, one member dissenting, held that in thus disciplining the supervisory personnel, the union had violated § 8 (b)(1)(B) of the Act,<sup>3</sup> in accord with its decision of the same day in Local 2150, IBEW (Wisconsin Electric Power Co.), 192 N. L. R. B. 77, enforced 486 F. 2d 602 (CA7 1973), cert. pending No. 73–877, holding that:

"The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors.

"The purpose of Section 8 (b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. . . ." 192 N. L. R. B., at 78.

Accordingly, the Board ordered the unions to rescind the fines, to expunge all records thereof, and to reimburse the supervisors for any portions of the fines paid.

The Florida Power & Light Company, [Florida Power] the petitioner in No. 73–556, has maintained a collective-bargaining agreement with the International Brotherhood of Electrical Workers, AFL-CIO and Locals 641, 622, 759, 820, and 1263, represented by the System

International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, 192 N. L. R. B. 85 (1971) [hereinafter Illinois Bell].

Council U-4, since 1953. That agreement does not require employees to become union members as a condition of employment, but many of its supervisory personnel have in fact joined the union. The Company has elected to recognize the union as the exclusive bargaining representative of these supervisors, and certain aspects of their wages and conditions of employment are provided for in the agreement. In addition, other higher supervisory personnel not covered by the agreement were allowed to maintain union membership, and, although not represented by the union for collective-bargaining purposes, received substantial benefits as a result of their union membership, including pension, disability and death benefits under the terms of the International's constitution.

Since the same International union was involved in both Nos. 73-556 and 73-795, the union members of Florida Power bore the same obligations under the Inter-

<sup>\*</sup>System Council U-4 was named as a respondent in the complaint, but the Board dismissed all charges against it and entered its order only against the local unions.

<sup>&</sup>lt;sup>5</sup> Supervisory employees thus included are District Supervisors, Assistant District Supervisors, Assistant Supervisors, Plant Superintendents, Plant Supervisors, Assistant Plant Superintendents, Distribution Assistants, Results Assistants, Assistant Plant Engineers, and Subsection Supervisors.

<sup>&</sup>lt;sup>6</sup> In both *Illinois Bell* and this case, some of the supervisors involved, though union members, did not actively participate in union affairs and paid no dues. This was because they held "honorary" withdrawal cards, permitting them to return to active membership without paying normal initiation fees in the event they returned to rank and file work. These cards also permitted their holders to continue participation in the International's death benefit fund. Other supervisors held "participating" withdrawal cards under which they continued to pay a fee equal to the monthly dues and remained eligible for pension, death, and disability benefits. The holders of these cards were also not permitted to participate in other union affairs.

national's constitution as did the union members of Illinois Bell. See ante, p. —. With respect to union discipline of supervisor members, however, the Florida Power collective-bargaining agreement itself provided:

"It is further agreed that employees in [supervisory] classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification..."

From October 22, 1969, through December 28, 1969, the international union and its locals engaged in an economic strike against Florida Power. During the strike, many of the supervisors who were union members crossed the picket lines maintained at nearly all the company's operation facilities, and performed rank and file work normally performed by the striking nonsupervisory Following the strike, the union brought charges against those supervisors covered by the bargaining agreement as well as those not covered, alleging violations of the international union constitution. Those found guilty of crossing the picket lines to perform rank and file work, as opposed to their usual supervisory functions, received fines ranging from \$100 to \$6,000 and most were expelled from the union, thereby terminating their right to pension, disability, and death benefits. Upon charges filed by Florida Power, the Board, in reliance upon its prior decisions in Wisconsin Electric and Illinois Bell, held that the penalties imposed "struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of such representatives," in violation of §8 (b)(1)(B) of the Act. Accordingly, the Board ordered the union to cease and desist, to rescind and refund all fines, to expunge all records of the disciplinary proceedings, and to restore those disciplined to full union membership and benefits.

The Illinois Bell case was first heard by a panel of the Court of Appeals for the District of Columbia Circuit, 487 F. 2d 1113, and then on rehearing was consolidated with Florida Power and considered en banc. In a 5-4 decision, the court held that "[S]ection 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members-supervisors though they be-for performance of rank and file struck work," and accordingly refused to enforce the Board's orders.\* Section 8(b)(1)(B), the court held, was intended to proscribe only union efforts to discipline supervisors for their actions in representing management in collective bargaining and the adjustment of grievances. It was the court's view that when a supervisor forsakes his supervisory role to do work normally performed by nonsupervisory employees, he no longer acts as a managerial representative and hence "no longer merits any immunity from discipline." 487 F. 2d, at 1157. We granted certiorari, 415 U.S. ---, to consider an important and novel question of federal labor law

<sup>&</sup>lt;sup>7</sup> International Brotherhood of Electrical Workers System Council U-4, 193 N. L. R. B. 30 (1971) [hereinafter Florida Power].

<sup>\*</sup>International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, — U. S. App. D. C. —, 487 F. 2d 1143 (1973) [hereinafter IBEW v. NLRB].

II

Section 8 (b) of the National Labor Relations Act provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances";

The basic import of this provision was explained in the Senate Report as follows:

"[A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." 9

For more than 20 years after § 8 (b)(1)(B) was enacted in 1947, the Board confined its application to situations clearly falling within the metes and bounds of the statutory language. Thus, in Los Angeles Cloak Joint Board ILGWU (Helen Rose Co.), 127 N. L. R. B. 1543 (1963), the Board held that § 8 (b)(1)(B) barred a union from picketing a company in an attempt to force the employer to dismiss an industrial relations consultant thought to be hostile to the union. See also Local 986, Miscellaneous Warehousemen, Driver and Helpers Tak-Trak, Inc.), 145 N. L. R. B. 1511 (1964); South-

<sup>&</sup>lt;sup>9</sup> S. Rep. No. 105, 80th Cong., 1st Sess., 21. I Legislative History of the Labor Management Relations Act, 1947, 427 (hereinafter cited as "Leg. Hist.").

ern California Pipe Trades District Council No. 16 (Paddock Pools of California, Inc.), 120 N. L. R. B. 249 (1958). Similarly, the Board held that § 8 (b) (1) (B) was violated by union attempts to force employers to ioin or resign from multiemployer bargaining associations. United State, Tile, etc. Wkrs. Assn. Local 36 (Roofing Contractors Association of Southern California), 172 N. L. R. B. 2248 (1968); Orange Belt District Council of Painters No. 48 (Painting & Decorating Contractors of America, Inc.), 152 N. L. R. B. 1136 (1965); General Teamsters Local Union No. 324 (Cascade Employers Association, Inc.), 127 N. L. R. B. 488 (1960), as well as by attempts to compel employers to select foremen from the ranks of union members, Baltimore Typographical Union No. 12 (Graphic Arts League), 87 N. L. R. B. 1215 (1949); International Typographical Union (American Newspaper Publishers Assn.), 86 N. L. R. B. 951, enforced 193 F. 2d 782 (CA7 1951); International Typographical Union (Haverhill Gazette Co.), 123 N L. R. B. 806, enforced 278 F. 2d 6 (CA1), affirmed by an equally divided Court, 365 U.S. 705 (1961).10

In 1968, however, the Board significantly expanded the reach of §8 (b)(1)(B), with its decision in San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.), 172 N. L. R. B. 2173. In that case,

<sup>&</sup>lt;sup>10</sup> The Haverhill Gazette case was typical. There the union had demanded the inclusion of a "foreman clause" providing that the composing room foreman, who had the power to hire, fire, and process grievances, must be a member of the union, although he would be exempted from union discipline in certain circumstances for activities on behalf of management. As the Court of Appeals pointed out: "Not only would the clause . . . limit the employers' choice of foremen to union members, but it would also give the unions power to force the discharge or demotion of a foreman by expelling him from the union." 278 F. 2d, at 12.

three union-member foremen were expelled from the union for allegedly assigning bargaining unit work in violation of the collective-bargaining agreement. Despite the absence of union pressure or coercion aimed at securing the replacement of the foremen, the Board held that the union had violated § 8 (b)(1)(B) by seeking to influence the manner in which the foremen interpreted the contract:

"That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the charging party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foreman or face de facto nonrepresentation by them." 172 N. L. R. B., at 2173.

Subsequent Board decisions extended §8(b)(1)(B) to proscribe union discipline of management representatives both for the manner in which they performed their collective bargaining and grievance adjusting functions, and for the manner in which they performed other supervisory functions if those representatives also in fact possessed authority to bargain collectively or to adjust griev-See Detroit Newspapers Printing Pressmen's ances. Union 13, 192 N. L. R. B. 106 (1971); Meat Cutters Union Local 81, 185 N. L. R. B. 884, enforced 147 U.S. App. D. C. 375, 458 F. 2d 794 (1972); Houston Typographical Union 87, 182 N. L. R. B. 592 (1970); Dallas Mailers' Union Local 143 (Dow Jones Company, Inc.), 181 N. L. R. B. 286, enforced, — U. S. App. D. C. —. 445 F. 2d 730 (1971); Sheet Metal Workers' International Association, Local Union 49 (General Metal Products, Inc.), 178 N. L. R. B. 139, enforced 430 F. 2d 1348

11

(CA10 1970); New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.), 176 N. L. R. B. 797 and 177 N. L. R. B. 500, both enforced 454 F. 2d 1116 (CA10 1972); Toledo Locals No. 15-P and 272, Lithographers and Photoengravers International (Toledo Blade Company, Inc.), 175 N. L. R. B. 1072, enforced 437 F. 2d 55 (CA6 1971).11

These decisions reflected a further evolution of the Oakland Mailers doctrine. In Oakland Mailers, the union had disciplined its supervisor-members for an alleged misinterpretation or misapplication of the collective-bargaining agreement, and the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union. In the subsequent cases, however, the Board held that the same coercive effect was likely to arise from the disciplining of a supervisor whenever he was engaged in management or super-

<sup>&</sup>lt;sup>11</sup> In Toledo Blade, two supervisors were disciplined by the union for working in a crew smaller than the contractually-prescribed minimum and for doing production work in excess of the contractually-permitted maximum. These activities occurred during an economic strike. The Trial Examiner, in a holding which foreshadowed the cases now before us, noted that such discipline is an unwarranted interference with the employer's control over its own representatives and

<sup>&</sup>quot;deprives the employer of the undivided loyalty of the supervisor to which it is entitled. If, therefore, the supervisor has actually been designated as the employer's bargaining or grievance representative . . . the union's discipline of the supervisor is unquestionably a restraint upon, and coercion of the employer's continuing its selection of, and reliance upon, the supervisor as its bargaining and grievance representative."

175 N. L. R. B., at 1080-1081.

In enforcing the Board's order, the Court of Appeals noted: "This conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness would thereby be impaired." 437 F. 2d, at 57.

visory activities, even though his collective bargaining or grievance-adjustment duties were not involved. Through the course of these decisions, §8 (b)(1)(B) thus began to evolve in the view of the Board and the courts "as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers." Toledo Locals No. 15-P and 272, Lithographers and Photoengravers International, supra, 175 N. L. R. B., at 1080, or for acts "performed in the course of [their] management duties," Meat Cutters, Local 81 v. NLRB, supra, 458 F. 2d, at 796.12

In the present cases, the Board has extended that doctrine to hold that § 8 (b)(1)(B) forbids union discipline of supervisors for performance of rank and file work on the theory that the performance of such work during a strike is an activity furthering management's interests.<sup>13</sup> We agree with the Court of Appeals that § 8 (b)(1)(B) cannot be so broadly read. Both the language and the legislative history of § 8 (b)(1)(B) reflect a clearly

<sup>12</sup> Indeed, in its original panel decision in the instant *Illinois Bell* case, the Court of Appeals spoke of § 8 (b) (1) (B) as prohibiting union discipline of supervisory employees "for actions performed by them within the general scope of their supervisory or managerial responsibilities." 487 F. 2d, at 1119.

<sup>&</sup>lt;sup>13</sup> As the Court of Appeals for the Seventh Circuit reasoned in enforcing the Board's order in Wisconsin Electric,

<sup>&</sup>quot;What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike. Otherwise, with no employees to supervise, many supervisors would simply have no managerial responsibilities during a strike. . . . Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes." 486 F. 2d, at 608.

focussed congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer "in the selection of his repre-

By its terms, the statute proscribes only union restraint or coercion of an employer "in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances," and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.

The specific concern of Congress was to prevent unions from trying to force employers into or out of multiemployer bargaining units. As Senator Taft, cosponsor of the legislation, explained:

"Under this provision it would be impossible for a union to say to a company, 'we will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes." (93 Cong. Rec. 3837; II Leg. Hist. 1012.)

That the legislative creation of this unfair labor practice was in no sense intended to cut the broad swath at-

<sup>&</sup>lt;sup>14</sup> Section 8 (b) (1) (B) was in fact a more restrained solution to the problem of multiemployer bargaining than originally proposed. Proposed § 9 (f) (i) of the House bill, H. R. 3020 would have prohibited multiemployer bargaining altogether, see H. Rep. No. 245, 80th Cong., 1st Sess., 8-9, 56. I Leg. Hist. 299-300, 347.

tributed to it by the Board in the present cases is pointed up by the further observation of Senator Taft that:

"This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.'" 93 Cong. Rec. 3953, II Leg. Hist. 1012.15

Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8 (b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

<sup>15</sup> In a similar vein, Senator Ellender observed that:

<sup>&</sup>quot;The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill, in subsection 8 (b) (1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of its bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences." 93 Cong. Rec. 4143; II Leg. Hist. 1077.

We may assume without deciding that the Board's Oakland Mailers' decision fell within the outer limits of this test, but its decisions in the present cases clearly do not. For it is certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank and file struck work.16

## III

It is strenuously asserted, however, that to permit a union to discipline supervisor-members for performing rank and file work during an economic strike will deprive the employer of the full loyalty of those supervisors. Indeed, it is precisely that concern that is reflected in these

<sup>16</sup> To hold that union discipline of supervisor-members for performing rank and file struck work is not proscribed by § 8 (b) (1) (B) of the Act is not to hold that such discipline is expressly permitted by § 8 (b) (1) (A) of the Act, as construed in NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967). The decision in that case is inapposite where the union seeks to fine not employee-members but supervisor-members, who are explicitly excluded from the definition of "employee" by § 2 (3), 29 U.S. C. § 152 (3), and hence from the coverage of § 8 (b) (1) (A). See Beasley v. Food Fair of North Carolina, Inc., supra. The Act, therefore, neither protects nor prohibits union discipline of supervisor-members for engaging in rank and file struck work. In light of the fact that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions," NLRB v. Drivers Local Union No. 639, 362 U.S. 274, 282-283 (1960), the admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate is particularly apt in this context. NLRB v. Insurance Agents, 361 U. S. 477, 490 (1960). See Summers, Disciplinary Powers of Unions. 3 Ind. & Lab. Rev. 843 (1950); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327 (1958); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960).

and other recent decisions of the Board holding that the statutory language "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" is not confined to situations in which the union's object is to force a change in the identity of the employer's representatives, but may properly be read to encompass any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees. As the Board stated in Wisconsin Electric:

"During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.

"The purpose of Section 8 (b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer." 192 N. L. R. B., at 78.

The Board's brief in the present cases echoes this view in arguing that "where a supervisor is disciplined by the union for performing other supervisory or management functions, the likely effect of such discipline is to make him subservient to the union's wishes when he performs those functions in the future. Thus, even if the effect of this discipline did not carry over to the performance of the supervisors' grievance adjustment or collective bargaining functions, the result would be to deprive the employer of the full allegiance of, and control over, a representative he has selected for grievance adjustment or collective bargaining purposes."

The concern expressed in this argument is a very real one, but the problem is one that Congress addressed, not through §8(b)(1)(B), but through a completely different legislative route. Specifically, Congress in 1947 amended the definition of "employee" in § 2 (3), 29 U.S.C. § 152 (3), to exclude those denominated supervisors under § 2 (11), 29 U. S. C. § 152 (11), thereby excluding them from the coverage of the Act.17 See NLRB v. Bell Aerospace Co., - U.S. - (1974). Further, Congress enacted § 14 (a), 29 U. S. C. § 164 (a), explicitly providing:

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining

<sup>17 29</sup> U. S. C. § 152 (3):

<sup>&</sup>quot;The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor . . . " 29 U. S. C. § 152 (11):

<sup>&</sup>quot;The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Thus, while supervisors are permitted to become union members. Congress sought to insure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, see Carpenters District Council of Milwaukee County v. NLRB, 107 U. S. App. D. C. 55, 274 F. 2d 564 (1959); A. H. Bull Steamship Co. v. National Marine Engineers' Beneficial Assn., 250 F. 2d 332 (CA2 1957), the right to discharge such supervisors because of their involvement in union activities or union membership, see Beasley v. Food Fair of North Carolina, Inc., - U.S. - (1974); See also Oil City Brass Works v. NLRB, 357 F. 2d 466 (CA5 1966); NLRB v. Fullerton Publishing Co., 283 F. 2d 545 (CA9 1960); NLRB v. Griggs Equipment Inc., 307 F. 2d 275 (CA5 1962); NLRB v. Edward G. Budd Mfg. Co., 169 F. 2d (CA6), cert. denied, 335 U.S. 908 (1949),18 and the right to refuse to engage in collective bargaining with them, see L. A. Young Spring & Wire Co. v. NLRB, 82 U. S. App. D. C. 327, 163 F. 2d 905, cert. denied, 333 U.S. 837 (1948).

The legislative history of §§ 2 (3) and 14 (a) of the Act clearly indicates that those provisions were enacted in response to the decision in *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485 (1947), in which this Court upheld

<sup>&</sup>lt;sup>18</sup> It has been held that this right is limited to the extent that an employer cannot discharge supervisory personnel for participation in the union where the discharge is found to interfere with, restrain, or coerce employees in the exercise of their protected rights, see *NLRB* v. *Talladega Cotton Factory*, *Inc.*, 213 F. 2d 209 (CA5 1954), or where it is prompted by the supervisors' refusal to engage in unlawful activity, see *NLRB* v. *Lowe*, 406 F. 2d 1033 (CA6 1969).

the Board's finding that the statutory definition of "employee" included foremen, and that they were therefore entitled to the coverage of the Act in the absence of a decision by Congress to exulude them. In recommending passage of this legislation, the Senate Report noted:

"It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file." Sen-

"It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the Maryland Drydock Case (49 N. L. R. B. 733). In other words, the bill does not prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous statuts of

employees." Senate Report, at 5; I Leg. Hist. 411.

<sup>19</sup> Prior to the passage of the National Labor Relations Act in 1935. foremen and rank and file workers were often members of the same bargaining unit, and such conflict of interest problems as arose were dealt with through the collective-bargaining process. After first holding that supervisors could organize in independent or affiliated unions in Union Collieries Coal Co., 41 N. L. R. B. 961 (1942) and Godchaux Sugars, Inc., 44 N. L. R. B. 874 (1942), the Board, concerned by the conflict of interests created thereby, reversed its position in Maryland Drydock Co., 49 N. L. R. B. 733 (1943), and held that except where foremen had been organized in 1935 when the Act was passed, supervisory units were not appropriate collective-bargaining units under the Wagner Act. The Board then reversed its position again in Packard Motor Car Co., 61 N. L. R. B. 4, enforced 157 F. 2d 80 (CA6), aff'd 330 U. S. 485 (1947), holding that supervisory employees as a class were entitled to the rights of self-organization and collective bargaining. See NLRB v. Bell Acrospace Co., supra. - U. S., at -: Beasley v. Food Fair of North Carolina. Inc., supra, — U. S., at — n. 4. See also House Report at 13-14, I Leg. Hist. 304-305. In discussing the proposed legislation dealing with supervisory personnel, the Senate Report stated:

ate Report, at 5, I Leg. Hist. 411. (Emphasis supplied.)

A similar concern with this conflict of loyalties problem was reflected in the House Report:

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with . . . our policy to protect the rights of employers; they, as well as workers, are entitled to lyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: That no one, whether employer or employee need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust." House Report, at 14-17, I Leg. Hist. 305-308 (emphasis supplied).<sup>20</sup>

<sup>20</sup> Instructive as well is the fact that §§ 2 (3) and 14 (a) were both slightly modified versions of §§ 9 (a) and (c) of the Case bill, H. R. 4908, 79th Cong., 2d Sess. (1946), which was passed by Congress in 1946 but vetoed by President Truman. See Senate Report, at 5, I Legis. Hist. 411. That earlier bill, however, contained no provision bearing any resemblance to § 8 (b) (1) (B), which first appeared in S. 1126, 80th Cong., 1st Sess. (1947).

It is clear that the conflict of loyalties problem that the Board has sought to reach under § 8 (b)(1)(B) was intended by Congress to be dealt with in a very different manner.21 As we concluded in Beasley v. Food Fair of North Carolina, Inc., supra, - U. S., at -:

"This history compels the conclusion that Congress' dominar\* purpose in enacting §§ 2 (3), 2 (11) and 14 (a) was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests."

While we recognize that the legislative accommodation adopted in 1947 is fraught with difficulties of its own. "[i]t is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." Colgate-Palmolive Peet Co. v. NLRB, 338 U. S. 355, 363 (1949).22

<sup>21</sup> Further support for the proposition that § 8 (b) (1) (B) was addressed to a separate and far more limited problem than that of conflict of loyalties dealt with in §§ 2 (3), 2 (11) and 14 (a) is found in the differing scope of the provisions themselves. Section 8 (b) (1) (B) purports to cover only those selected as the employer's representative "for the purpose of collective bargaining or the adjustment of grievances," whereas the class of supervisors excluded from the definition of employees in § 2 (3) is defined by § 2 (11) toinclude individuals engaged in a substantially broader range of activities. See supra, n. 17; NLRB v. Bell Aerospace Co., supra. two groups coincide only with respect to the function of grievance adjustment.

<sup>22</sup> There can be no denying that the supervisors involved in the present cases found themselves in something of a dilemma, and were pulled by conflicting loyalties. But inherent in the option afforded the employer by Congress, must be the recognition that supervisors permitted by their employers to maintain union membership will necessarily incur obligations to the union. See Nassau and Suffolk Contractors Association, Inc., 118 N. L. R. B. 179, 182 (1957). See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951). And, while both the employer and the union may

Congress' solution was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union, see Beasley v. Food Fair of North Carolina, Inc., supra. Alternatively, an employer who wishes to do so can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining.<sup>23</sup> But it is quite apparent, given the statutory lan-

have conflicting but nonetheless legitimate expectations of loyalty from supervisor-members during a strike, the fact that the supervisor will in some measure be the beneficiary of any advantages secured by the union through the strike makes it inherently inequitable that he be allowed to function as a strikebreaker without incurring union sanctions.

The supervisor-member is of course not bound to retain his union membership absent a union security clause, and if, for whatever reason, he chooses to resign from the union, thereby relinquishing his union benefits, he could no longer be disciplined by the union for working during a strike. NLRB v. Granite State Joint Board, 409 U. S. 213 (1972); Booster Lodge 405 v. NLRB, 412 U. S. 84 (1973).

In these cases, the supervisors' dilemma has been somewhat exaggerated by the petitioners. In *Illinois Bell*, the company did not command its supervisors to work during the strike and expressly left the decision to each individual. Those who chose not to work were not penalized, and some were in fact promoted by their employer after the strike had ended. Those who did work during the strike but performed only their regular duties were not disciplined by the union. *In Florida Power*, the record does not disclose whether the supervisors crossed the picket lines at the company's request or not, but in any event, the union did not discipline those who did so only to perform their normal supervisory functions.

<sup>23</sup> Thus, while a union violates §8 (b) (1) (B) by striking to force an employer to agree to hire only union members as foremen, *International Typographical Union Local 38* v. *NLRB*, 278 F. 2d 6 (CA1), affirmed by an equally divided Court, 365 U. S. 705 (1961),

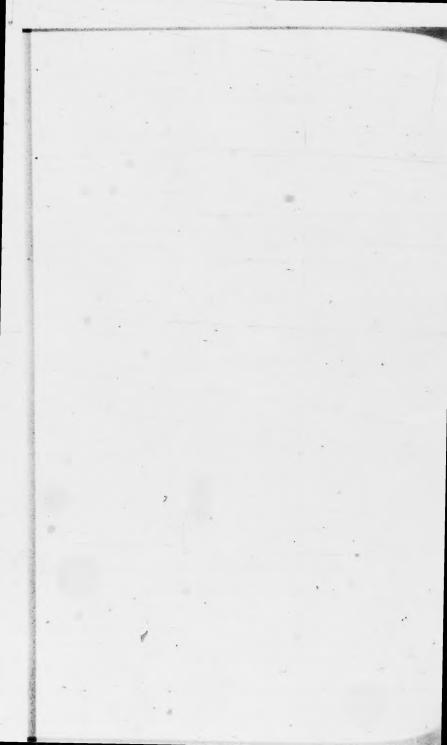
guage and the particular concerns that the legislative history shows were what motivated Congress to enact § 8(b) (1)(B), that it did not intend to make *that* provision any part of the solution to the generalized problem of supervisor-union member conflict of loyalties.

For these reasons, we hold that the respondent unions did not violate § 8 (b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank and file struck work. Accordingly, the judgment is

Affirmed.

see n. 7, supra, it can propose that supervisors be covered by the collective-bargaining agreement, Sakrete of Northern California, Inc. v. NLRB, 332 F. 2d 902 (CA9), cert. denied, 379 U. S. 961 (1965). Similarly, it is clear that an employer may request that supervisors be excluded from the bargaining unit, Federal Compress & Warehouse Co. v. NLRB, 398 F. 2d 631 (CA6 1968); NLRB v. Corral Sportswear Co., 383 F. 2d 961 (CA10 1967).

The parties in Florida Power in fact agreed to the inclusion in the collective-bargaining agreement of provisions governing the discipling by the union of supervisory personnel, basically providing that such matters were to be dealt with through the grievance adjustment and arbitration provisions of the agreement. See pp. — of text, supra.



## SUPREME COURT OF THE UNITED STATES

Nos. 73-556 AND 73-795

Florida Power & Light Co., Petitioner,

73-556 v.

International Brotherhood of Electrical Workers, Local 641, 622, 759, 820, and 1263, et al.

National Labor Relations
Board, Petitioner,
73-795 v.
International Brotherhood
of Electrical Workers.

AFL-CIO, et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 24, 1974]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

Believing that the majority has improperly substituted its judgment for a fair and reasonable interpretation by the Board of § S (b)(1)(B) in light of the statutory language and legislative history of that provision and other provisions dealing with supervisors, I must dissent substantially for the reasons expressed by the dissent below.

While it might be unreasonable for the Board to interpret § 8 (b)(1)(B) to permit an employer to require absolute loyalty from a supervisor-member in all circumstances, it is certainly apparent that during an economic strike. the supervisor's performance of rank-and-file struck work, which represents a classic "use of economic

"When a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline equally interferes with the employer's control over his representative and equally deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his 'normal' supervisory duties."

¹ The court below acknowledged the practical realities of the use of supervisors during a strike: "in the highly automated public utility industries involved in these cases a small work force composed of strikebreakers and non-union management personnel can evidently provide sufficient manpower to continue vital services in a strike, thereby cutting into the strike's effectiveness." International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, — U. S. App. D. C. —, 487 F. 2d 1143, 1161 n. 21 (en banc 1973).

International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, supra, 487 F. 2d, at 1176 (dissenting opinion).<sup>2</sup>

In a steady progression of decisions leading up to the instant cases, the Board concluded that §8(b)(1)(B) interdicted not only direct union pressure on an employer to replace a supervisor with collective-bargaining or grievance-adjustment functions, but also indirect coercion of an employer by means of attempting, through the application of union discipline apparatus against supervisormembers, to dictate the manner in which they would exercise their supervisory responsibilities. Far from seeing the present cases as a radical extension of this principle, I view the Board's decisions as a reasoned and realistic application of §8 (b)(1)(B). For my part, the Board's findings are based upon substantial record evidence and enjoy "a reasonable basis in law." NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944). It may be true that special concerns prompted §8(b)(1)(B). but the provision, as is often the case, was written more broadly. Nor do I see anything in the legislative history foreclosing the Board from applying the section to prevent unions from imposing sanctions on supervisors in the circumstances present here. This Court is not a super-Board authorized to overrule an agency's choice between reasonable constructions of the controlling statute. We should not impose our views on the Board as long as it stays within the outer boundaries of the statute it is charged with administering. Respectfully, I dissent.

<sup>&</sup>lt;sup>2</sup> I do not read the Court to say that § 8 (b) (1) (B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute.